SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 110

HAROLD I. CAMMER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 31, 1955

CERTIORARI GRANTED OCTOBER 10, 1955

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joint Appendix

In the United States District Court for the District of Columbia Circuit

Miscellaneous No. 11-54

In Re Harold I. Cammer

Application for Order to Issue to Harold I. Cammer to Show Cause Why He Should Not Be Adjudged in Criminal Contempt of This Court—Filed May 10, 1954

Leo A. Rover, United States Attorney for the District of Columbia and appointed and directed by this Court to investigate this matter, applies to this Court for an order to issue to Harold I. Cammer to show cause why he should not be adjudged in criminal contempt of this Court. In support of this application, the said Leo A. Rover, alleges:

1. On August 28, 1953, an indictment, Criminal No. 1344-53, was returned against Ben Gold by the May 1953 grand jury of this Court charging him, as President of the International Fur and Leather Workers Union, with having filed with the National Labor Relations Board a false non-communist affidavit for the year 1950, in violation of 18 USC 1001. Harold I. Cammer is an attorney of record in the said case of *United States v. Ben Gold*, having entered an appearance therein as such attorney on August 31, 1953.

2. Harold I. Cammer is an attorney for Vera Taft, secretary to Ben Gold, President of the International Fur and [fol. 2] Leather Workers Union, and Pietro Lucchi, Treasurer of said Union. Miss Taft and Mr. Lucchi were subpoenaed to appear on September 22, 1953, and testify as witnesses and to produce certain documents before the May 1953 grand jury of this Court. Harold I. Cammer entered an appearance in this Court on or about September 22, 1953, to argue motions to quash and vacate the subpoenas issued

to said Taft and Lucchi. As a consequence of the proceedings on September 22, 1953, the appearances of the said Taft and Lucchi before the May 1953 grand jury were deferred and they have not yet appeared.

3. On and after September 22, 1953, Harold I. Cammer well knew that the May 1953 grand jury was continuing its investigation concerning other possible violations of 18 USC 1001, similar to the violations charged in the indictment in Criminal No. 1344-53.

4. On or about September 22, 1953, Harold I. Cammer, in his capacity as attorney for Ben Gold before this Court, mailed or caused to be mailed in New York City, New York, certain letters with identical questionnaires enclosed, addressed to certain members of the May 1953 grand jury of this court well knowing that said grand jury had returned the indictment against Ben Gold in Criminal No. 1344-53, and well knowing that said grand jury had subpoenaed Vera Taft and Pietro Lucchi as witnesses; and further well knowing that said grand jury had not been discharged and that its term had not expired.

5. On or about the 23rd day of September 1953, Harold I. Cammer caused to be delivered by the United States Post Office Department, certain letters with identical questionnaires enclosed, to certain members of the May 1953 grand jury of this Court at their homes and residences in the District of Columbia within the jurisdiction of this Court, well [fol. 3] knowing that said grand jury had not been discharged and that its term had not expired.

6. Harold I. Cammer, in mailing or causing to be mailed and in causing to be delivered the aforesaid letters and questionnaires to certain members of the aforesaid grand jury at their homes and residences, did so without the permission, consent, authorization, or knowledge of this Court at the time, well knowing that said grand jury had not been discharged and that its term had not expired.

7. The aforesaid letters and questionnaires are now in the possession and safekeeping of this Court and are specifically incorporated herein and made a part hereof by reference thereto. A copy of one such letter and questionnaire is attached hereto and made a part hereof.

8. The acts and conduct of Harold I. Cammer, as set forth in the foregoing paragraphs, constitute:

Misbehavior by an officer of this Court in his official transactions with this Court, in violation of section 401, Title 18 U. S. C.

Wherefore, petitioner respectfully requests this Court to issue an order to Harold I. Cammer to show cause why he should not be adjudged in criminal contempt of this Court as above alleged.

Respectfully submitted, Leo A. Rover, United States Attorney; Oliver Gasch, Principal Assistant, United States Attorney.

[fol. 4] EXHIBIT, ANNEXED TO APPLICATION FOR ORDER — Filed May 10, 1954

(Letterhead of)

HAROLD I. CAMMER

September 22, 1953.

Re: U. S. v. Gold

U. S. District Court for the District of Columbia
Criminal No. 1344-53

Dear Madam:

I am counsel for the defendant, Mr. Ben Gold, in the above-entitled proceeding. I am writing you and all of the other Federal government employees who sat on the Grand Jury which indicted Mr. Gold. I do this in the interest of the fair administration of criminal justice.

In an effort to learn the effect of the loyalty program on jurors from the Federal Government, I ask you please to answer the enclosed questionnaire as objectively as possible and return it to me as soon as possible. I am requesting the other grand jurors who are Federal government employees to do the same. The questionnaire does not seek, and I do not want any information concerning the proceedings or deliberations of the Grand Jury on which you sat.

Answering the questionnaire puts you to some unavoidable trouble. But it is, as you will know, your duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case.

A self-addressed stamped envelope is enclosed for your convenience. Promptness in your reply is important, and will be appreciated.

Sincerely yours, Harold L. Cammer.

Enclosure.
Special Delivery.
Registered Mail.
Ret: Rec. Req.

[fol. 5] Exhibit Annexed to Application for Order—Filed May 10, 1954

Questionnaire

In what department of the Federal Government are you employed?

Do your duties in any way involve you in the government's program against Communists and Communism?

Do you think that a government employee could get into trouble if he joined or contributed to an organization which supported something which he was for, and which he did not think had anything wrong with it, if the Department of Justice had declared the organization to be Communist? If so, why?

Do you think that a government employee might get into trouble if he did not drop a friend or acquaintance if he learned that he was suspected by the Department of Justice of communism?

Do you think that it is wise or safe for a government employee to express views on a controversial question different from the position of the Government?

Do you think a government employee might get into trouble if he owned or read a book which might be suspected of being a communist or left-wing book?

Do you think a government employee could get into trouble if he gave a truthful character affidavit for use at

a hearing in which the fellow employee is charged with disloyalty to his Government?

Do you think that a government employee could get into trouble if he defended a fellow government employee charged with disloyalty whom he knew to be innocent?

On the whole do you think that it was advisable, in the past six years, in view of the loyalty program, for government employees to take certain precautions, such as: (a) avoiding an acquaintance; (b) giving up a friendship; (c) resigning from an organization; (d) declining to join or make a contribution to an organization; (e) keeping his views on controversial questions to himself and close friends; (f) declining to help a government employee in a [fol. 6] loyalty proceedings, although he knows of nothing against him; (g) avoiding books, magazines and music that might be left-wing in nature or authorship; or (h) advising another fellow employee to do any of the foregoing? Please indicate whether any or all of these would be wise precautions, if so, why?

Are you involved in a loyalty proceeding? Have you ever been involved in such a proceeding?

Are you concerned about possible involvement in a loyalty proceeding in the future?

Do you believe that a government employee might someday have to explain his action in a loyalty proceeding if, as a juror, he voted to acquit or not to indict a person who was widely publicized as a past or present communist?

Do you believe that even if he did not become involved in a loyalty proceeding he might become involved in other difficulties? If so, what kind?

Do you think that such a vote might affect his employment status, in any way, such as possible promotions, assignments, or selection for layoff in the current reductions in force? If so, how?

Do you believe that a government employee's obligation to the Federal Government and to its program of fight communism would be consistent with his voting to acquit or refuse to indict a man officially charged by our Government with communist activity?

Would you be inclined to believe that the Department of Justice might be right when it charges someone with com-

communism, or that otherwise it would not be bothering an innocent person?

Did you mention to or discuss the receipt of this questionnaire with any attorney or representative of the Department of Justice or with your superiors on your job? If so, with whom?

If so, did you receive from them any suggestions as to whether you should reply to this questionnaire?

Dated ——— ———.

Signed: ——— ———.

———

[fol. 7] IN UNITED STATES DISTRICT COURT

ORDER OF CHIEF JUDGE LAWS, DATED MAY 10, 1954, DIRECTING HAROLD I. CAMMER TO SHOW CAUSE WHY HE SHOULD NOT BE ADJUDGED GUILTY OF CRIMINAL CONTEMPT—Filed May 10, 1954

Leo A. Rover, United States Attorney for the District of Columbia, appointed and directed by this Court to investigate this matter, having heretofore filed an application for an order to issue to Harold I. Cammer to show cause why he should not be adjudged in criminal contempt of this Court, and in support of the application having alleged that said Harold I. Cammer, as an officer of this Court, misbehaved in his official transactions with this Court, by communicating with certain members of the May 1953 Grand Jury of this Court in that he mailed or caused to be mailed and caused to be delivered to them certain letters together with enclosed questionnaires without the knowledge, consent, approval, or permission of this Court, said Grand Jury being then empanelled and not yet discharged or its term expired, and this fact being well known to the said Harold I. Cammer, a copy of which is attached hereto and made a part hereof; and

It appearing to this Court that good cause has been shown for issuance of such an order, it is hereby

Ordered that Harold I. Cammer, whose principal office is located at 9 East 40th Street, New York City, State of

New York, show cause, if any there be, on the 21st day of May, 1954, at 10 o'clock in the forenoon of that day in the United States Courthouse in the City of Washington in the District of Columbia, why he should not be adjudged guilty of criminal contempt of this Court, as aforesaid; and it is

[fol. 8] Further ordered that Leo A. Rover, United States Attorney for the District of Columbia, and Oliver Gasch, Assistant United States Attorney, be and they are hereby appointed to represent this Court in the instant matter.

Sufficient cause appearing therefor, let service of a copy of this order, together with a copy of the application annexed and filed herein, on the said Harold I. Cammer on or before the 17th day of May, 1954, be deemed good and sufficient service hereof.

Dated: May 10, 1954.

Bolitha J. Laws, United States District Judge.

In United States District Court

Answer of Harold I. Cammer—Filed May 20, 1954

* * * * * * * *

The defendant, Harold I. Cammer, by Charles E. Ford, his attorney, for his Answer to the Application for an Order to Show Cause herein:

I. Admits the allegations of paragraphs 1 through 7 of the application, but denies the allegations of paragraph 8 that the acts and conduct set forth in said paragraphs 1 through 7 constitute misbehavior by an officer of this Court in his official transactions with this Court in violation of Section 401, Title 18, U. S. C.

II. As and for a further defense to the application, defendant alleges:

[fol. 9] 1. On August 28, 1953, the May, 1953, Grand Jury of this Court returned an indictment against Ben Gold, (Criminal No. 1344-1953) charging him with having filed with the National Labor Relations Board a false non-com-

against affidavit on August 29, 1950, in violation of 18 U. S. C. 1001.

2. Defendant is a member of the bar of the State of New York having been admitted to practice in that State in April, 1933. Defendant was retained as attorney for said Gold and on August 31, 1953, filed an appearance pro hac vice as attorney for the defendant.

3. Upon information and belief, prior to the return of the aforementioned indictment against Gold, two grand juries of the United States District Court for the Southern District of New York, had investigated the same alleged offense but had returned no indictments.

4. Upon the arraignment of said Gold in this Court on September 4, 1953, a plea of not guilty was entered and Chief Judge Laws allowed thirty days for pre-trial motions with leave to apply for additional time upon a showing of need therefor.

5. Immediately after the arraignment of said Gold, defendant applied to and received from the Clerk of this Court a roster of the May, 1953, Grand Jury for the purpose of considering a motion pursuant to Rule 6(b)(2) of the Federal Rules of Criminal Procedure.

6. Upon inspection of such roster defendant learned that a majority, to wit, thirteen, of the members of said Grand Jury were government employees. Defendant thereupon gave consideration to a motion pursuant to said Rule 6(b)(2) to challenge the legal qualification of government employees to sit as grand jurors in a case involving charges of Communism in the face of the then regenerated loyalty and security program and the public castigation of those [fol. 10] accused of "coddling" Communists. Such question was accentuated by the fact that two prior grand juries in the City of New York, where government employees had not dominated, had returned no indictment in the Gold case.

7. Defendant undertook, within the time available, a careful and thorough study of the law respecting the qualifications of government employees in such a case and the appropriate means of presenting a challenge in accordance with the Rule. Such research disclosed that while such challenges had not infrequently been made, they had previously failed for lack of proof of bias in the particular

case." On the basis of such research, and particularly of his study of *Dennis v. United States*, 339 U. S. 162; *United States v. Wood*, 299 U. S. 123, and *Frazier v. United States*, 335 U. S. 497, defendant became convinced that, as was said in *Dennis*, "preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury," and that "the way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact."

8. Defendant thereupon undertook a study of the records and briefs in the two most recent cases in this Court involving such a challenge (*Emspak v. United States*, 203 F. (2d) 54, at 61; *United States v. Weinberg*, Criminal, 829-52) for the purpose of determining the appropriate means, in accordance with the rules and practice of this Court, whereby the suspected bias might be established as a fact.

9. Defendant ascertained that in *Emspak* the challenge had failed on the ground, urged by the United States Attorney for the District of Columbia, that a defendant desiring to challenge the qualifications of government employees as grand jurors was under a duty himself first to interview [fol. 11] such grand jurors for the purpose of determining whether bias did in fact exist before applying to the Court for relief, and that in the absence of such an effort and showing based thereon he was not entitled to a hearing. The Government's position was set forth in the *Emspak* brief to the Court of Appeals, at pp. 27-8, as follows:

> "The appellant in this motion was not only asserting that at least eight of the twelve members of the grand jury indicated in this motion were prejudiced and disqualified, but was promising to prove it if given the opportunity: *yet there is not the slightest indication in the long motion and offer of proof that an attempt has been made to interview a single one of the persons.* Under all the circumstances it is clear that the court acted properly in denying the motion for a hearing. In the absence of any reason for appellant not making his whole showing in the usual form of affidavits, it can be asserted on this review that the trial judge had exclusive discretion to deny a hearing. *The appellant was trying to get the court*

to make an investigation which the appellant should have made himself." (Italics supplied.)

10. Defendant further learned that the same issue had been involved in the *Weinberg* case in which, in a bench ruling made November 17, 1952, Judge Kirkland of this Court had upheld the government's position that a defendant could not apply for a hearing as to the qualifications of government employees as grand jurors, unless he had first undertaken to "contact" them to ascertain preliminarily the existence of bias. Judge Kirkland stated that there was "nothing to prevent counsel, if he sees fit, contacting those 15 members [of the grand jury] and inquiring only of one subject, whether or not they had any per- [fol. 12] sonal bias toward . . . [defendant] and on that account did they return the indictment." In this respect defendant respectfully refers to the motion challenging the grand jury in the *Weinberg* case, a certified copy of which is hereto annexed, marked Exhibit A.

11. Defendant also consulted with Dr. Marie Jahoda, Associate Professor of Social Psychology at the Graduate School of Arts and Sciences of New York University and Associate Director of the Research Center for Human Relations at the same school, who had recently co-authored with Dr. Stuart W. Cook, also of New York University, a study of the impact of the current loyalty and security measures upon the ability of government employees fairly to pass upon cases involving charges of communism. Such study had been published at 61 Yale Law Journal 295 *et seq.* and had earned her a research prize awarded by the American Psychological Association.

12. Defendant also consulted with Joseph A. Fanelli and Harry Rand, members of the bar of this Court with offices in the District of Columbia, who had been attorneys for the defendant in the *Weinberg* case, as to the appropriate means, in accordance with the rules and practice of this Court, of preparing and presenting such a challenge.

13. As a result of such consultations, research and deliberation, defendant rejected the notion of a personal interview with the grand jurors for the reasons that such an interview would not be sufficiently overt and might be

susceptible to misinterpretation. Defendant learned that in the *Weinberg* case, Messrs. Fanelli and Rand had undertaken to meet this problem by addressing to the government employees on the grand jury, in lieu of an interview, a questionnaire with reference to the impact of the loyalty and security programs upon their qualifications as grand jurors. Upon specific inquiry of Messrs. Fanelli and Rand, [fol. 13] defendant was advised that such a letter had been sent by them without the prior knowledge or authority of this Court, and that after such letter had been sent, the contents of such letter and accompanying questionnaire with the results thereof, were made known to this Court by a supplemental motion in support of a hearing as to the qualifications of the grand jurors and that no suggestion of criticism by reason of the sending of such letter had been made either by the Court (Holtzoff, J.) or by the government. Such letter and questionnaire are on file in the *Weinberg* case in this Court in support of said motion and certified copies thereof are annexed hereto, marked Exhibits B and C, and incorporated by reference.

14. Defendant relied in good faith upon the foregoing direct precedent and upon the suggestion contained in the United States Attorney's brief in *Emspak*, as aforesaid, the ruling of Judge Kirkland, and the acquiescence of Judge Holtzoff and the United States Attorney in the *Weinberg* case. He accordingly prepared a letter in the same form and language as composed by Messrs. Fanelli and Rand in the *Weinberg* case, a copy of which is on file in this Court, as aforesaid, and a similar questionnaire as propounded by them only reducing the length of the questionnaire. As so modified, defendant on his letterhead by registered mail, return receipt requested, addressed it to the government employees on the May, 19[illegible] Grand Jury which had returned the Gold indictment.

15. Within a few days after such letter and questionnaire were mailed, defendant was visited by agents of the Federal Bureau of Investigation concerning the matter and learned from them that such letter was the subject of investigation. Defendant disclosed the foregoing facts and circumstances to the agents and promptly addressed a letter again setting forth such facts and circumstances to

[fol. 14] Hon. David A. Pine, District Judge of this Court, before whom the matter had come. A copy of such letter is hereto annexed as Exhibit D and is hereby incorporated by reference.

16. Thereafter the time for motions in *United States* v. *Gold* was extended and on December 7, 1953, defendant filed a motion in said action for a hearing respecting the qualifications of the grand jury. In support of said motion defendant filed his affidavit setting forth that he had addressed such letter and questionnaire to the government employees who sat on the grand jury; that he had received no response and thereforo prayed for a hearing. A copy of such affidavit is annexed hereto as Exhibit E and incorporated by reference. In addition defendant submitted affidavits from Professors Jahoda and Cook as to their expert opinion with respect to the lack of qualification of government employees in such a case.

17. As appears from the face of the letter, defendant stated therein that "I do not seek, and I do not want any information concerning the proceedings on the grand jury on which you sat." The questions propounded in the questionnaire were consistent with such statements and such questions under the holding of *Morford* v. *United States*, 339 U.S. 258, were lawful and permissible and were not intended or calculated to and, upon information and belief, did not have the effect of and could not influence the grand jurors in their deliberations.

18. In his acts and conduct as aforesaid, defendant was actuated only by a desire properly to discharge his duties as counsel for a defendant in a criminal case subject to his duties and obligations as an officer of this Court. He attempted to act with scrupulous regard to his obligations as an officer of the Court on the basis of careful and diligent research into the substantive law and the specific [fol. 15] precedent in this Court, and then on the basis of a direct and specific precedent by members of the bar of this Court in a case where a prompt and full disclosure of the practice followed had been made to the Court and where no suggestion of impropriety has resulted. Defendant acted in good faith and under the exigencies of a need to prepare his motions in timely fashion. Defendant was at all times

direct and candid with the Court and took no covert or surreptitious action of any kind. If defendant violated any rules or practice of this Court, such violation was unknown to defendant and was unintended.

Wherefore defendant prays that the application be dismissed and the proceeding terminated.

Charles E. Ford, 416 Fifth Street, N.W., Washington, D. C., Attorney for Defendant.

(Verified by Harold I. Cammer, May 19, 1954.).

[fol. 16] Exhibit A, Annexed to Answer—Filed Feb. 24, 1953. Filed May 20, 1954

United States District Court for the District of Columbia

Criminal No. 829-52

United States of America

v.

Joseph W. Weinberg

Second and Supplemental Motion to Dismiss Indictment on Ground of Predominant Government-Employee Composition of Grand Jury, or in the Alternative for a Hearing to Ascertain Bias of Government Employee Grand Jurors

Comes now the defendant by his counsel herein and respectfully moves the Court to dismiss the indictment herein on the ground of the predominant government-employee composition of the grand jury; or in the alternative to grant a *voir dire* hearing so that the bias of government-employee grand jurors may be ascertained. For reasons in support of this motion it is respectfully stated that:

1. As the record in this case discloses, fifteen of the twenty-three grand jurors who considered this case and returned the indictment against defendant were employees of the Federal government.

[fol. 17] 2. In view of this predominant government-employee composition of the grand jury and the nature of this case, defendant, in motions heretofore filed in this proceeding, requested that the Court dismiss the indictment as having been returned by an improperly constituted grand jury or grant a *voir dire* hearing to determine whether such government employees were biased because of the impact of the loyalty and security programs on government employees. The Court is respectfully referred to the affidavits annexed to the prior motion to dismiss, which affidavits are incorporated herein and made a part hereof.

3. After argument, Judge Kirkland denied those motions. Judge Kirkland, however, stated that there was "nothing to prevent counsel, if he sees fit, contacting those 15 members and inquiring only of one subject, whether or not they had any personal bias toward * * * (defendant) and on that account, did they return the indictment."

4. In accordance with the suggestion of Judge Kirkland, defendant's counsel sent each of the fifteen government-employee grand jurors, by registered mail, a letter and questionnaire, true copies of which are annexed hereto. Defendant's counsel has been advised by the Post Office Department that all these letters have been delivered; and the registered mail return receipts are annexed hereto.

5. In response to these letters, defendant's counsel has received only one letter from the grand juror, Maurice J. Orler, a true copy of which is annexed hereto. That grand juror expressly declined to fill out the questionnaire. The other fourteen grand jurors did not answer at all.

6. Defendant respectfully suggests that the failure of the fifteen government-employee grand jurors to respond to defendant's questionnaire on bias is in and of itself [fol. 18] indicative of the present pressure upon government-employee grand jurors in a case of this kind resulting from the many aspects of the Federal government's loyalty-security program.

7. Defendant respectfully urges that the incompetence of Federal government employees to sit on a grand jury in a case of this type is shown as a matter of law by the affidavits and documents submitted in support of this motion. On this showing and on the showing already made

of record, it is earnestly submitted that defendant did not receive the impartial and fair consideration of a grand jury as was his constitutional right. And that, accordingly the indictment herein must be dismissed.

S. If, nevertheless, the Court believes that additional proof of the government employee disqualification is necessary, defendant should be afforded the opportunity to make such proof at an appropriate hearing to which the government employee grand jurors may be summoned. Judge Kirkland's suggestion was carried out and found not feasible. It is plain that the only way in which defendant and this Court can ascertain the full extent to which the loyalty-security program of the Federal government rendered government employees incompetent to sit on the grand jury in this case is by hearing under the supervision and with the assistance of the Court.

Respectfully submitted, (S.) Joseph A. Fanelli, Harry I. Rand, Wyatt Building, Washington, D. C., Attorneys for Defendant.

[fol. 19] Exhibit B, Annexed to Answer—Filed May 20, 1954

STerling 3-1540

Joseph A. Fanelli
Attorney at Law

Wyatt Building—777 Fourteenth Street, N. W.
Washington 5, D. C.

February 11, 1953.

Registered Mail
Ret. Rec. Req.

Re: U. S. v. Weinberg, U. S. District Court for the District of Columbia, Criminal No. 829—52.

Dear Sir:

As counsel for the defendant, Dr. Weinberg, in the above-entitled proceeding, I am writing you and all of the other

Federal Government employees who sat on the Grand Jury which indicted Dr. Weinberg for perjury. I do this in aid of the administration of justice.

In an effort to show the impingement of the loyalty program on jurors from the Federal Government, I ask you please to answer the enclosed questionnaire as objectively as possible and return it to me as soon as possible. I am requesting the other grand jurors who are Federal government employees to do the same. The questionnaire does not seek, and I do not want any information concerning the proceedings of the Grand Jury on which you sat.

Answering the questionnaire puts you to some unavoidable trouble. But if is, as you will know, your duty as a [fol. 20] citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case.

Promptness in your reply is important, and will be appreciated.

Sincerely yours, Joseph A. Fanelli.

Enclosure

EXHIBIT C, ANNEXED TO ANSWER—Filed May 20, 1954

Questionnaire

Are you an employee of the Federal Government?

Would you as a government employee join an organization which the U. S. Department of Justice has declared to be a communist organization? If not, why?

Would you as a government employee feel some reluctance in joining or contributing to any organization? If so, why?

Would you as a government employee in any way associate with a man suspected by the Department of Justice of communism? If not, why?

Would you as government employee associate in any way with a man whom you suspect but do not know to be a communist? If not, why?

If your views on a controversial question differed from the position of your Government would you as a government employee feel free to express such views to a fellow Federal employee? If not, why?

Considering that the position of your Government may

change in the future, would you feel free to express your views on a controversial question to a fellow government [fol. 21] employee, even though your views do not differ from your Government's position?

Would you as a government employee own or read a book which might be suspected of being a communist or left-wing book? If not, why? If you were to read such a book by accident would you feel free to speak of it to a fellow government employee? If not, why?

Would you as a government employee listen to music originally composed and played in the U.S.S.R.? If not, why?

Would you be reluctant to give a Federal government employee a truthful character affidavit for his use at a hearing in which he is charged with disloyalty to his Government? If so, why?

If you believed a fellow government employee charged with disloyalty to be innocent, would you freely express your belief to others? If not, why?

Have you in the past five years, and with the Government's loyalty program in mind, (a) avoided an acquaintance; (b) given up a friendship; (c) resigned from an organization; (d) declined to join or make a contribution to an organization; (e) kept your views on controversial questions to yourself and close friends; (f) declined to help a government employee in a loyalty proceeding, although you know of nothing against him; (g) avoided books, magazines and music that might be left-wing in nature or authorship; or (h) advised another fellow employee to do any of the foregoing? If yes to any of the foregoing, why?

Are you now personally involved in a government loyalty proceeding? Have you ever been personally involved in a government loyalty proceeding? If so, would you mind going through another one? If not, why?

Are you concerned about personal involvement in a government loyalty proceeding in the future?

[fol. 22] Do you believe that if you sit as a juror in this case and vote for an aquittal, you might some day have to explain that action in a government loyalty proceeding?

Do you believe that your obligation to the Federal Government as a government employee would be consistent with your voting to acquit a man officially charged by your

Government with perjury concerning communist activity?

Do you feel, in view of your status as a government employee and the operation of the government loyalty program, that you can be absolutely impartial as a juror in this case where your Government officially charges the defendant with perjury concerning communist activity?

Would you be inclined to believe that a committee of the U. S. Congress must be right when it charges someone with communism, or that otherwise the charge would not be made?

Would you be inclined to believe that an indictment for perjury concerning communist activity must be right, or otherwise the Grand Jury would not be bothering an innocent man?

Do you think that the United States Government would not charge a man with perjury concerning communist activity unless he was guilty?

Signed:

A True Copy

Test: 5-19-54

Harry M. Hull, Clerk, By Frances Betanesurt, Deputy Clerk.

[fol. 23] Exhibit D, Annexed to Answer—Filed May 20, 1954

(Letterhead of)
Harold L. Cammer

October 2, 1953

Hon. David A. Pine,
United States District Judge,
United States Courthouse,
John Marshall Place and
Constitution Avenue,
Washington, D. C.

Re: United States v. Gold, Criminal No. 1344-53.

Honorable Sir:

I have just obtained a transcript of the proceedings which occurred in your Court last Thursday, September

24, 1953, in connection with a letter I had written to those members of the grand jury which returned the indictment in this case who are employed by the federal government. Since you characterized this as a grave matter, I hasten to submit a statement of the circumstances under which the letter was sent so that you may have all of the facts.

The indictment in this case charges the filing of an affidavit under the Taft Hartley Law which falsely denied membership in or affiliation with the Communist Party, or support of any organization which advocates forcible overthrow of the Government. Two grand juries in New York had previously investigated the charges now made but had failed to indict. A majority of the members of the grand jury in the District of Columbia which returned the indictment were government employees.

[fol. 24] In the cases where the Supreme Court had upheld the qualifications of government workers to sit as jurors in criminal cases in the District of Columbia, it had emphasized that it was always open to a defendant to show their lack of qualification in a particular case. *United States* v. *Wood*, 299 U. S. 123; *Frazier* v. *United States*, 335 U. S. 497; *Dennis* v. *United States*, 339 U. S. 162.

In *Wood* Chief Justice Hughes said that "in dealing with an employee of the Government the Court would properly be solicitous to discover whether in view of the nature or circumstances of his employment or of the relation of the particular Government activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him" (at p. 134). And in *Dennis*, the Court said "that the way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact" (at p. 168).

Under the circumstances, it seemed necessary and appropriate to determine whether government employees were qualified, in terms of freedom from bias and fear, to act in a case where official charges of communism were being made.

In view of the current loyalty programs, this question has been much litigated recently and the reported decisions point to the necessity and importance of direct inquiry as to the particular jurors' freedom from bias or fear.

In *Morford v. United States*, 339 U. S. 258, the Supreme Court held that defense counsel had the right to question prospective government employee jurors with specific reference to the possible influence of the loyalty program on their ability to render a just and impartial verdict. In the recently decided cases of *United States v. Quinn*, *United States v. Emspak*, in 203 Fed. 2nd, a majority of the Court of Appeals for the District of Columbia upheld the denial [fol. 25] of a hearing as to the qualification of the grand jurors who were employed by the government since the prosecutions for contempt of Congress there involved presented essentially only questions of law. But the majority pointed out that "the grand jury was not called upon to evaluate the probabilities of a doubtful *prima facie* case, or of a charge in the realm of opinion or controversy" (at p. 60).

The present case does involve sharply disputed issues of fact around a charge in the realm of opinion or controversy. The impartiality of the federal employees who sat on the grand jury is critical in such a case. The government has consistently urged that proof of a general climate of fear induced by the loyalty program is insufficient and that a hearing should not be granted without proof of bias or fear on the part of the particular grand jurors. In its brief to the Court of Appeals in *Emspak*, for example, it criticized the adequacy of the defense showing there made because "there is not the slightest indication in the long motion offer of proof that an attempt had been made to interview a single one of the persons" (Case No. 10943, at p. 28).

In the subsequent case of *United States v. Weinberg*, tried in the District Court before Judge Holtzoff, counsel for the defendant, in support of a motion for a hearing and apparently upon the suggestion of Judge Kirkland, who accepted the government's view as to the showing which had to be made, addressed a letter to the grand jurors employed by the federal government in which he enclosed a five page questionnaire designed to determine the impact of the loyalty program upon their qualifications.

This letter and questionnaire were thereafter submitted to Judge Holtzoff in support of the application for a hearing. At no time was there any suggestion by the Court, or by [fol. 26] the government, that the letter and questionnaire were improper.

The letter sent by counsel in the *Weinberg* case is in the files of the District Court. I adopted and copies the form and language of that letter in my letter almost word for word. The questionnaire is also substantially the same, except that I reduced it from five pages to two.

My letter was sent on the basis of the specific precedent in the *Weinberg* case in an effort to meet the standard set by the government itself in the *Emspak* case. Because of the danger of misunderstanding, I did not think it wise, however, to seek to interview the grand jurors personally and selected the method of a letter instead.

On Thursday, September 24, 1953, before I knew of the proceedings before the Court, I was visited in my office by agents of the Federal Bureau of Investigation with respect to the letter and made to them a full statement substantially the same as I am reporting to Your Honor.

It is scarcely necessary to assure Your Honor that I had no intention to influence the grand jury. My letter stated that "the questionnaire does not seek and I do not want any information concerning the proceedings or deliberations of the Grand Jury on which you sat". I cannot comprehend how questions of the character which I sent, addressed solely to the impact of the loyalty program on their qualifications as grand jurors, could possibly influence their judgment. In this connection, I should like to call Your Honor's attention to Rule 6(b)(1) of the Rules of Criminal Procedure which provides that challenges to the qualifications of grand jurors may be made even before they consider the matter. And Rule 6(b)(2) provides for such a challenge after their consideration of the matter has been completed.

[fol. 27] I trust that the foregoing satisfactorily explains the matter to Your Honor, particularly since, as a guest in your Court, I am especially anxious to avoid any suggestion of impropriety.

A copy of this letter is being sent to Mr. Lowther.

Respectfully yours,

HIC:AW
ftul/1283

cc: Hon. Joseph A. Lowther, Department of Justice, Washington, D. C.

[fol. 28] EXHIBIT E, ANNEXED TO ANSWER—Filed May 20, 1954

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 1344-53

UNITED STATES OF AMERICA

v.

BEN GOLD

AFFIDAVIT OF HAROLD I. CAMMER

CITY OF NEW YORK,
County of New York, ss:

HAROLD I. CAMMER, being duly sworn, deposes and says:

1. I am one of the counsel for the defendant in the above-captioned case.

2. In connection with my study of the question of the qualifications of government employees to sit on the grand jury in a case such as the defendant's, I learned that the government had argued to the Court of Appeals in the case of Emspak v. United States that "there is not the slightest indication in the long motion and offer of proof that an attempt had been made to interview a single one of the persons." I also learned that in the case of United States v. Weinberg, counsel for the defendant, acting on a suggestion by Judge Kirkland, addressed a letter to the govern-[fol. 29] ment employees who were grand jurors in that case attaching a five page questionnaire designed to determine the impact of the loyalty and security program upon their qualifications.

3. In accordance with these suggestions, I prepared a letter and questionnaire which I modelled after the questionnaire in the Weinberg case and which I then sent to all of the government employees who were grand jurors in the case of the present defendant. I am attaching a copy of this letter and questionnaire.

4. This letter and questionnaire was sent to all of the government employees who were grand jurors by registered mail, return receipt requested. I received from the post office return receipts which indicated that all of these letters were duly received by the addressees. I have not, however, received any response to any of these letters or questionnaires.

5. Upon the basis of this experience, I am certain that it is impossible to carry out an investigation of this nature except as a result of a court ordered hearing with an opportunity to address questions to the grand jurors in open court.

Harold I. Cammer.

Subscribed and sworn to before me this — day of December, 1953. ———

[fol. 30] IN UNITED STATES DISTRICT COURT

ORDER OF JUDGE MORRIS CONTINUING HEARING—Filed May 21, 1954

This cause came on for hearing on the order of this Court to show cause why defendant Harold I. Cammer should not be adjudged in criminal contempt of this Court, and it appearing to the Court that defendant did, on May 20, 1954, file an answer with exhibits attached thereto, and it further appearing to the Court that in paragraph one of the answer defendant Cammer has admitted the allegations contained in paragraphs one through seven of the Government's application for an order to show cause, and has in the subsequent paragraphs thereof stated his explanation of his conduct, thereby leaving for the Court's resolu-

tion only the legal issue as to whether the admitted conduct of the defendant constitutes a violation of Section 401(2) of Title 18 USC, it is, upon the the consent of the respective parties,

ORDERED that legal memoranda in support of the respective positions of the parties be filed on or before June 1, 1954, and

IT IS FURTHER ORDERED that the hearing on the order to show cause be, and the same hereby is continued to June 4, 1954, at 10:00 a.m.

Jas. W. Morris, Judge.

Consent:

OLIVER GASCH,
Oliver Gasch,
Assistant United States Attorney.

CHARLES E. FORD,
Charles E. Ford,
Attorney for Defendant.

[fol. 31] IN UNITED STATES DISTRICT COURT

ORDER ADJUDICATING DEFENDANT GUILTY AND APPROVING CASH BOND PENDING APPEAL, OF CHIEF JUDGE LAWS—Filed June 21, 1954

Upon consideration of the application filed herein by Leo A. Rover, United States Attorney in and for the District of Columbia, charging defendant Harold I. Cammer with contempt of court in violation of 18 United States Code, Section 401 (2), and upon the order signed by this Court requiring defendant Harold I. Cammer to show cause why he should not be held in contempt of court and the sworn answer of defendant Harold I. Cammer filed herein and upon consideration of the undisputed facts disclosed by the pleadings, and counsel for the defendant and the United States Attorney having filed legal memoranda and having been heard orally in support of their respective positions, and the Court being fully advised, it is this 21st day of June, 1954,

Ordered and adjudged that the defendant Harold I. Cammer be and he is hereby found guilty of contempt of court in violation of Title 18, Section 401 (2), United States Code, and he is hereby fined the sum of One Hundred Dollars ($100.00) with leave however to post One Hundred Dollars ($100.00) as a cash bond pending appeal.

Bolitha J. Laws, Judge.

Seen: Charles E. Ford.

Presented by: Oliver Gasch.

[fol. 32] In United States District Court

Memorandum of Chief Judge Laws of June 15, 1954—Filed July 20, 1954

Before the oral hearing of this case, the Court gave study to the briefs filed by counsel. It also listened attentively to arguments of counsel at the hearing. Nothing has changed its understanding that whenever a case is pending before judge or jury, no pressure or harrassment of any character should be exercised on one who must make a decision. Unfortunately within late years there has been a tendency to bring such pressures and harrassment. For a time, there was picketing of courts during trials. Then there came about unseemly conduct of counsel in court, requiring disciplining of counsel. Now it appears searching questionnaires have been submitted to grand jurors while they are considering certain types of cases.

It has never occurred to me a lawyer would not know the evil of such practices. In the case now before the Court, it has been argued that counsel for one indicted wished to ascertain whether certain grand jurors were biased; that this Court had allowed only thirty days for this purpose; and timely action had to be taken. That if suggestion had been made to the Court there was reasonable indication of partiality of grand jurors but due to pendency of similar charges before these jurors the investigation could not then be explored, the Court, if convinced of good faith, unques-

tionably, would have postponed the time for filing motions until all indictments were filed and opportunity to ascertain the status of jurors had been afforded.

There is a decided difference between questioning jurors after they have concluded their services and questioning jurors when they are actively hearing or considering a case. To harrass them by challenging and lengthy questions [fols. 33-34] while they are deliberating or about to consider cases is intolerable. A timid juror will not fail to be disturbed, possibly influenced. A stalwart juror at least will be disturbed. Such an approach impinges freedom of thought and decision. Jurors will not serve competently if so harrassed.

While the Court finds there is no question as to the impropriety of what respondent has done, it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong. There seems to be reason to believe respondent may have misconceived the proprieties. What he did was open. There was no opprobrious personal approach to jurors. There is indication respondent may have believed he had a right to propound the questions at the time he did, notwithstanding this Court is of opinion he had not. Under these circumstances, in the absence of a positive declaration by the Court, it may be unjust to severely punish respondent as otherwise would be required. Granting respondent all favorable inferences, his acts clearly disregarded the protection which must be vouchsafed jurors. The Court finds him guilty of contempt and imposes a fine of $100.

Bolitha J. Laws, C. J.

June 15, 1954.

[fol. 35] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12353

HAROLD I. CAMMER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

OPINION—Decided May 5, 1955

Mr. Charles E. Ford for appellant.

Mr. Oliver Gasch, Assistant United States Attorney, with whom Messrs. Leo A. Rover, United States Attorney, and Lewis Carroll, Assistant United States Attorney, were on the brief, for appellee.

Before Wilbur K. Miller, Fahy and Danaher, Circuit Judges

DANAHER, Circuit Judge:

Cammer appeals from an order adjudging him guilty of criminal contempt. The essential facts are that Cammer is attorney of record for one Gold; on August 28, 1953, an indictment was returned against Gold by the May 1953 grand jury; the grand jury after Gold's indictment subpoenaed other persons represented by Cammer; on September 22, 1953, Cammer appeared in the District Court on behalf of these other persons and moved to quash and vacate the subpoenas served upon them; on this same day and the day following, September 22 and 23, 1953, Cammer sent identical letters and questionnaires to some [fol. 36] fifteen members of the grand jury who were federal employees, and in so doing, Cammer acted without the permission or knowledge of the District Court. The questionnaires related in general to the effects of the government's loyalty program on the grand jurors. The letter accompanying the questionnaire stated that it was being submitted "in the interest of the fair administration of criminal justice" and urged that it was the recipient's

"duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case."

The trial judge found that the questionnaires harassed the jurors and impinged upon their freedom of thought and decision. He described Cammer's action as "intolerable" but concluded that a fine of $100 would be sufficient punishment since there was some doubt as to whether Cammer's acts "were committed in conscious wrong."

Cammer's contempt was adjudged specifically under § 401 of the Federal Contempt Statute, 18 U.S.C. § 401 (1952),[1] which provides as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

[fol. 37] The government's application for an order to show cause was predicated upon acts and conduct said to constitute a violation of subsection (2) of the foregoing section. Although appellant set up certain defenses which will not be detailed, his answer admitted all allegations of the government's petition except the following:

> "The acts and conduct of Harold I. Cammer, as set forth in the foregoing paragraphs, constitute:
>
> "Misbehavior by an officer of this Court in his official transactions with this Court, in violation of section 401, Title 18 U.S.C."

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[1] Although Nye v. United States, 313 U.S. 33 (1941), involves a complaint for violation of the first subsection of 18 U.S.C. § 401, at page 44 *et seq.* is presented important background material. Earlier treatment of the derivation of the statute is presented by Mr. Justice Harlan in Savin, Petitioner, 131 U.S. 267; 274 *et seq.* (1889).

The power of Congress to legislate with respect to the contempt powers of the federal courts other than the Supreme Court, is not open to question. "These courts were created by acts of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted." *Ex parte Robinson*, 19 Wall. 505, 510-511 (U.S. 1873). The contempt statute has been described as an attempt by Congress "drastically" to limit the contempt powers of the courts. *In re Michael*, 326 U.S. 224, 227 (1945); *Nye v. United States*, 313 U.S. 33, 44-48 (1941). The *Michael* and *Nye* cases emphasize, however, that the main concern of Congress and the Supreme Court is not to protect contemptuous conduct, but to prevent abuses which may result from summary punishment.

Under the terms of 18 U.S.C. § 401 (2), we inquire whether: (1) Cammer was an officer of the court, (2) engaged in an official transaction, (3) whose conduct constituted misbehavior. For the reasons which follow, the majority answers these questions affirmatively, though with great respect for the contrary views of our colleague.

[fol. 38] 1. *Cammer was an officer of the court.*

It seems clear that attorneys are officers of the court within the intendment of the statute. In *Ex parte Garland*, 4 Wall. 333, 378 (U.S. 1866), Justice Field said: "[Attorneys] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." See also, *Ex parte Robinson*, 19 Wall. 505, 512 (U.S. 1873); *Ex parte Bradley*, 7 Wall. 364, 374 (U.S. 1868); and *Tanner*

v. *United States*, 62 F. 2d 601 (10th Cir. 1932), *cert. denied*, 289 U.S. 746 (1933), all of which involved contempt situations.[2]

2. *Cammer was engaged in an official transaction.*

That Cammer, as an "officer of the court," was engaged in an official transaction is clear. The facts show beyond dispute that Cammer's actions occurred while he was directly engaged "in the practice of the profession." *Ex parte Bradley*, *supra*, 7 Wall. at 374. The grand jury had just indicted one of his clients, and as he knew, currently had others under investigation. Each letter identified Cammer as attorney for the indicted client, Gold, and [fol. 39] stated that he was addressing it to all federal government employees " who sat on the Grand Jury which indicted Mr. Gold." Cammer's letter, appealing directly to the grand jurors' purported duty " to help enlighten the court," transmitted a questionnaire containing inquiries, a few samples of which will demonstrate its inevitable impact on the grand jurors.[3]

[fol. 40] The grand jury is an appendage of the court and "proceedings before it are to be regarded as being proceedings in the court." *Cimarola* v. *United States*, 111 F.

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[2] No point is made of the fact that the District Court admitted Cammer only *pro hac vice*. This would appear to be immaterial since the alleged contempt occurred in connection with the specific cases in which he was authorized to appear. See Bowles v. United States, 50 F. 2d 848, 851 (4th Cir. 1931), *cert. denied*, 284 U.S. 648 (1931).

[3] "In what department of the Federal Government are you employed?

. . . . . .

"Do you think it is wise or safe for a government employee to express views on a controversial question different from the position of the Government?

. . . . . .

"Do you think a government employee could get into trouble if he gave a truthful character affidavit for use at

2d 243, 246 (3d Cir. 1940), *cert denied*, 311 U.S. 651 (1940). See also, *United States v. Smyth*, 104 F. Supp. 283, 291 (N.D. Cal. 1952). The grand jury acts "under the authority of the court," we note in *Savin, Petitioner*, 131 U.S. 267, 277 (1889), which predicated Justice Cardoza's pronouncements "A talesman when accepted as a juror becomes a part or a member of the court," *Clark v. United States*, 289 U.S. 1, 11 (1933), and again at page 12, "A talesman, sworn as a juror, becomes, like an attorney, an officer of the court, and must submit to like restraints." That Cammer, in so communicating with an official arm of the court while conducting the court's business, was engaged in an official transaction cannot be doubted.

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a hearing in which the fellow employee is charged with disloyalty to his Government?

* * * * * * *

"Are you involved in a loyalty proceeding? Have you ever been involved in such a proceeding?

"Are you *concerned* about possible involvement in a loyalty proceeding in the future?

"Do you believe that a government employee might some day have to explain his action in a loyalty proceeding if, as a juror, he voted to acquit or not to indict a person who was widely publicized as a past or present communist?

* * * * * * * *

"Do you think that such a vote might affect his employment status in any way, such as possible promotions, assignments, or selection for layoff in the current reductions in force? If so, how?

"Do you believe that a government employee's obligation to the Federal Government and to its program of fight communism would be consistent with his voting to acquit or refuse to indict a man officially charged by our Government with communist activity?

* * * * * * *

"Did you mention to or discuss the receipt of this questionnaire with any attorney or representative of the Department of Justice or with your superiors on your job? If so, with whom?"

In urging that the statute does not apply in such circumstances appellant relies on the *Nye*, *Michael* and second *Schmidt* (124 F. 2d 177 (6th Cir. 1941)) cases. The *Nye* proceedings, brought under the *first* subsection of 18 U.S.C. § 401, did not involve an officer of the court, and the alleged contemnors, in fact, were not even parties to the litigation. The Court's opinion stated, 313 U.S. at 44: "The question is whether the conduct of petitioners constituted 'misbehavior . . . so near' the presence of the court 'as to obstruct the administration of justice'. . . ." Concluding that the words have a geographical connotation, the majority ruled that the reprehensible conduct was not punishable as contempt within the meaning of § 401(1) though of a kind which corrupts the judicial process and impedes the administration of justice. The case on its facts has nothing to do with our problem. In the *Michael* [fol. 41] case, *supra*, the contemnor, a court appointed trustee, had been adjudged guilty of contempt because of "false and evasive" testimony before a grand jury. The issues were not unlike those presented in *Ex parte Hudgings*, 249 U.S. 378 (1919). The Court noted that perjury alone does not constitute an "obstruction" of justice within § 401(1), and that element must be clearly shown where contempt is charged. The opinion cited *Clark v. United States*, *supra*, as an example of obstruction where a prospective juror had falsely testified in order to qualify. "It is difficult to conceive of a more effective obstruction to the judicial process that a juror who has prejudged the case," wrote Justice Black, 326 U.S. at 228, pointing out further that "the mere fact that false swearing is an incident to the obstruction charged does not immunize the culprit from contempt proceedings." But perjury alone did not predicate contempt proceedings under § 401(1), nor could the conviction be sustained under § 401(2) where the contemnor, though an officer of the court, was not engaged in an official transaction while testifying generally before the grand jury. In short, where the charge of perjury could be prosecuted with determination of guilt by a jury, that course, rather than summary contempt action, should be followed where there was lacking the element of obstruction of justice. The *Michael* case offers no comfort to one who either sought to influence the jury as it trans-

acted its business, or whose insinuating and unauthorized communications might have affected the grand jury's official consideration of the case against Cammer's clients.[4] In the second *Schmidt* case, as is clear from the facts [fol. 42] which appear in the court's first opinion (115 F. 2d 394), the court again was concerned primarily with the first rather than the second subsection of 18 U.S.C. § 401. In fact, it was stated in open court by the Government that no complaint was made in that case under the second subsection. Moreover, while attorneys were involved, they did not themselves make contacts with grand jurors, and their alleged contempts occurred when the court was not in session and grew out of actions they advised the clients to take. In brief, the cases relied upon by appellant may be distinguished, and none involves direct dealing between two officers of the court in a matter of official concern to both, as in the present situation.

3. Cammer's conduct constituted misbehavior.

For many practical reasons the courts have sought to protect grand juries in the exercise of their historic and important function, investing their deliberations with the seal of secrecy, protecting the jurors against harassment and otherwise recognizing their valued contributions in judicial administration.[5] Thus has evolved the rule re-

[4] Cf. Remmer v. United States, 347 U.S. 227, 229 (1954), where the Court said: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. . . . A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions. . . ."

[5] E.g., a defendant should not be permitted to "divert and turn back the course of a criminal case from a trial of himself to a trial of the grand jury and the prosecuting

[fol. 43] quiring judicial approval of proposals to penetrate the shield. *Schmidt v. United States*, 115 F. 2d 394, 397 (6th Cir. 1940); and cases there cited. See also, *United States v. American Medical Ass'n*, 26 F. Supp. 429 (D.D.C. 1939); *In re Bullock*, 103 F. Supp. 639 (D.D.C. 1952).[5]

Canner cast aside an unusually convenient opportunity to consult with the judge about his contemplated action when, while attorney for Gold who had been indicted, he appeared before the court on the morning of the very day the questionnaires were sent out. He there sought to quash a subpoena duces tecum running to one of Gold's associates, and he knew that the grand jury was continuing its investigation. If he had acted in good faith, he could then have sought judicial supervision, instead of which he went forward with his plan, kept it secret to himself, acted without advice from the court, and yet implied in his letter that it was the jurors' "duty" to the court to respond to the questionnaires.

The record here amply substantiates a finding of misbehavior. As Judge Laws said in his opinion: "To harass [the jurors] by challenging and lengthy questions while they are deliberating or about to consider cases is intoler-

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officers." United States v. American Medical Ass'n, 26 F. Supp. 429 (D.D.C. 1939); United States v. Smyth, 104 F. Supp. 283, 300-302 (N.D. Cal. 1952); cf. Bradley v. Fisher, 13 Wall. 335, 347-348 (U.S. 1871); Atwell v. United States, 162 Fed. 97, 100 (4th Cir. 1908).

[5] In the latter case, by the way, the reasons for secrecy are summarized as follows: "1. To prevent the escape of those indicted; 2. To insure the grand jury freedom in its deliberations; 3. To prevent any persons from annoying the grand jurors; 4. To prevent subornation of perjury with witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; 5. To encourage free and untrammeled disclosures by persons who have some information with respect to the commission of crimes; and, 6. To protect the innocent person, who is accused but exonerated, from the disclosure of the fact that he has been under investigation." See also, United States v. Amazon Industrial Chemical Corp., 55 F. 2d 254, 261 (D. Md. 1931).

able. A timid juror will not fail to be disturbed, possibly [fol. 44] influenced. A stalwart juror at least will be disturbed. Such an approach impinges freedom of thought and decision. Jurors will not serve competently if so harassed." Conduct similar in principle to that involved here has been condemned in many other cases.

In *Sinclair v. United States*, 279 U.S. 749, 765 (1929), the defendants in a criminal case had the jurors kept under surveillance whenever they were not actually within the court house. Investigations also were made concerning encumbrances on the home of one juror and to determine whether another had indicated his views during the trial. The Court upheld an adjudication of criminal contempt on these facts, even though it did not appear that any juror had actually been approached or communicated with or that any juror was conscious of the surveillance, although some jurors were suspicious. The punishment included heavy fines and imprisonment. Commenting on the conduct of the contemnors, the Court said (279 U.S. at 764-765):

> "That the acts here disclosed, and for which three of the appellants were certainly responsible, tended to obstruct the honest and fair administration of justice we cannot doubt. The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law. The most exemplary resent having their footsteps dogged by private detectives. All know that men who accept such employment commonly lack fine scruples, often wilfully misrepresent innocent conduct and manufacture charges. The mere suspicion that he, his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will [fol. 45] either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable

juries, in important cases, probably would become an impossibility. . . . We can discover no reasons for emasculating the power of courts to protect themselves against this odious thing."

In *Ex parte Bradley*, 7 Wall. 364, 374 (U.S. 1868), the Court reversed a contempt adjudication against an attorney which had been premised on the first clause of the first section of the Act of March 2, 1831, which is the equivalent of 18 U.S.C. § 401(1). In so doing, however, the Court markedly contrasted the power of the courts under like circumstances "to punish attorneys as officers of the same, for misbehavior in the practice of the profession." With respect to this latter power, Mr. Justice Nelson speaking for the Court said (7 Wall. at 374):

> "This power has been recognized and enforced ever since the organization of courts and the admission of attorneys to practice therein. If guilty of fraud against their clients, or of stirring up litigation by corrupt devices, or using the forms of law to further the ends of injustice; in fine, for the commission of any other act of official or personal dishonesty and oppression, they become subject to the summary jurisdiction of the court. Indeed, in every instance where an attorney is charged by affidavit with fraud or malpractice in his profession, contrary to the principles of justice and common honesty, the court, on motion, will order him to appear and answer, and deal with him according as the facts may appear in the case. . . . [T]his is a distinct head of proceeding from that of contempt of court, or of the members thereof, committed in open court, or in immediate view and presence, tending to interrupt its proceedings, or to impair the respect due to its authority. *This distinction is recognized in the act of 1831, already referred to, which, after providing for personal contempt in presence of the court, authorizes attachments to issue, and summary punishment to be inflicted, for 'the mis-*[fol. 46] *behavior of the officers of said courts in their official transactions.'*" (Emphasis supplied.)

In *Tanner v. United States*, 62 F. 2d 601 (10th Cir. 1933), *cert. denied*, 289 U.S. 746 (1933), an attorney after the jury returned its verdict in a case in which he was participating, encountered one of the jurors and proceeded to abuse the juror, who was a banker, for the small amount of damages awarded his client in the trial. The lawyer was adjudged in contempt, was fined $100, and suspended from practice until payment was made. The Court of Appeals upheld this conviction and made this pertinent comment (62 F. 2d at 602):

> "While the jury had returned a verdict in the Woody case in which the juror had sat, he was still an officer of the court and would be called in subsequent cases. Appellant also was an officer of the court. The attack having been made by one officer of the court upon another because of the subject matter of a trial concluded only so far as the return of a verdict by the jury, we are of the opinion while the attack was made outside of the courtroom and after the jury had returned its verdict, yet the case was still pending, and it was not only the right but the duty of the court to deal with the same. It is unthinkable a court should be so weak or supine, so wanting in constitutional power, as to not be able to protect its officers in the proper discharge of their sworn duty. That a juror, acting under his sworn duty in the administration of justice in one of our national courts, should be so basely accused and humiliated by an interested officer of the court cannot be thought not to be included in the statutory law above quoted. No doubt jurors, if such conduct as is found in this record should go unpunished, would fear to do their sworn duty in an honest, impartial manner, as must be done in the administration of justice in our courts. We are of the opinion the judgment imposed for the offense by the attorney in this case was well within the statutory [fol. 47] power conferred. Aside from this the court was very moderate in his punishment, and for that the court is to be commended and not criticized for its timely action in this case."

In the first *Schmidt* case, *supra*, 115 F. 2d 394 (6th Cir. 1940), several attorneys advised their clients that they could interrogate members of the grand jury relative to the evidence which had been submitted to it, and upon which indictments against them were based. The clients thereupon approached and interviewed a number of the grand jurors, and obtained affidavits which the attorneys submitted to the court in support of motions to quash the indictments. The attorneys were adjudged in contempt of court for their conduct. Commenting upon the attorneys' actions, the court said (115 F. 2d at 396:

> "The question of sincerity aside, the fact is that appellants' advice overlooked this oath and caused their clients and the grand jurors themselves to disregard it. The advice was given directly in the teeth of that clause of the oath which obligated the jurors to secrecy unless they were called upon in a court of justice to make disclosures, and of that portion of the court's charge to the grand jury hereinabove quoted. Advice which caused appellants' clients or the jurors themselves to disregard or ignore the oath was, per se, an unlawful interference with the proceedings of the court, and, however honestly given, was at least a technical contempt."[5]

[5] See also the exhaustive opinion of Chief Judge Fee in United States v. Smyth, 104 F. Supp. 283, 302-304 (N. D. Cal. 1952), in which he indicated that it would be contempt under 18 U. S. C. § 401 for an attorney, without a court order, to interrogate grand jurors about their motives or personal habits; and In re Grand Jury Proceedings, 4 F. Supp. 283 (E. D. Penn. 1933), which also indicates that a court order is necessary in order to avoid contempt in questioning grand jurors.

[fol. 48] Cammer urges upon us his alleged lack of intent, that there was an absence of conscious wrong. His reliance upon any such ground for exculpation is definitely misplaced. "In order that one may be held for contempt for communications with jurors, on the ground of the harmful tendency thereof, it is not necessary to prove that the

communications had or the acts done were accompanied with a wrongful intent. It is sufficient if such acts and communications were knowingly and wilfully done and had, and had the tendency to influence improperly the action of the jury." *Kelly v. United States*, 250 Fed. 947, 950 (9th Cir. 1918), *cert. denied*, 248 U.S. 585 (1919). In *Burke v. United States*, 90 F. 2d 840 (4th Cir. 1937), *cert. denied*, 302 U.S. 685 (1937), which arose under a statute which now appears at 18 U.S.C. § 1504 (1952), the defendant was charged with improperly communicating with a grand jury. Rejecting as a matter of law the defense that he had acted "openly and without corrupt intent," the court said that under the facts of the case "the only question which can arise under the statute is whether the person accused of sending the letter did so. Every one is presumed to intend the natural and probable consequences of acts intentionally done." Once we find, as we do, that Cammer's conduct tended to harass the grand jurors, it is immaterial whether Cammer was motivated by an evil purpose, or not, but were we pressed on the point we could readily find that he was.

We are not unmindful that "the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed. . . ." *Cooke v. United States*, 267 U.S. 517, 538 (1925). Here the appellant had the full benefit of whatever mitigating circumstances could properly be urged in the light of the facts. The *Cooke* case requires no more. See also, *Merrimack River Sav. Bk. v. Clay Center*, 219 U.S. 527, 536 [fol. 49] (1911); *Schmidt v. United States*, 115 F. 2d 394, 398 (6th Cir. 1940).

Chief Judge Laws concluded: "Granting respondent all favorable inferences, his acts clearly disregarded the protection which must be vouchsafed jurors. The Court finds him guilty of contempt and imposes a fine of $100."

The judgment is affirmed.

FAHY, *Circuit Judge, dissenting*: The question is the narrow one whether the conduct for which appellant was adjudged by the court guilty of criminal contempt was that of an officer of the court in an official transaction.

The only authority invoked to support the judgment is 18 U.S.C. § 401(2) (1952), empowering a court of the United States "to punish by fine or imprisonment such contempt of its authority" "and none other, as * * * (2) Misbehavior of any of its officers in their official transactions * * *." I assume the conduct was misbehavior within the meaning of this provision. And, of course, appellant as a member of the bar is an officer of the court. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378; *Savings Bank* v. *Ward*, 100 U.S. 195, 198; *Powell* v. *Alabama*, 287 U.S. 45, 73; *Hickman* v. *Taylor*, 329 U.S. 495, 510;[1] *Booth* v. *Fletcher*, 69 App. D.C. 351, 355, 101 F. 2d 676, 680, *cert. denied*, 307 U.S. 628. But when he communicated by mail with grand jurors to obtain information in preparing his client's case he was not engaging in an official transaction as an officer of the court. In other words, I do not think Congress intended by § 401(2) to grant courts the power by summary proceedings to police such professional behavior of a member of the bar. The well known avenues for sus- [fol. 50] pending, disbarring, or otherwise disciplining attorneys are available to reach their unprofessional and unethical conduct. The criminal law is available to punish them for criminal offenses, where they "will be afforded the normal safeguards surrounding criminal prosecutions." *Nye* v. *United States*, 313 U.S. 33, 53.[2] And contempt proceedings are also available to punish "[m]isbehavior of any person" in the court's presence or "so near thereto as to obstruct the administration of justice," or "[d]isobedience or resistance to" the court's "lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(1) and (3) (1952). But the language of § 401(2), "[m]isbehavior of" court officers "in their official transactions," is not apt wording to include a broad sweep of professional behavior of attorneys not in the presence of the court or "so near thereto as to obstruct the administration of justice." The language no doubt does apply to the official conduct

[1] For subsequent history see *Hickman* v. *Taylor*, 170 F. 2d 327 (3d Cir.), *cert. denied*, 336 U.S. 906.

[2] For subsequent history see *Nye* v. *United States*, 137 F. 2d 73 (4th Cir.), *cert. denied*, 320 U.S. 755.

of officers of the court, such, for example, as the clerk and marshal; and to referees, trustees, masters and attorneys in special capacities. Summary power to punish them might have been thought necessary to enable a court to function with propriety and integrity. But to construe § 401(2) to include the conduct here in question is to draw into the words "official transactions" of "officers" of the court an undefined and vague area of the professional activity of an attorney. This is not the ordinary meaning of the language and we should not, in view of *Nye* v. *United States*, *supra*, extend its meaning beyond the ordinary. Unless the requirements of the statute are clearly satisfied, "an offense will be dealt with as the law deals with the run of illegal acts", *ibid.*, 313 U.S. at p. 51, and not by summary procedure without the protection of the Bill of Rights.

[fol. 51] *Ex parte Bradley*, 74 U.S. (7 Wall.) 364, lends some support to the view of the majority. But the question in its present context was not there decided, and the opinion must now be read in the light of *Nye* v. *United States*, *supra*. See, also, the recent decision in *Offutt* v. *United States*, 348 U.S. 11, 14.

It must be remembered that the seriousness of the behavior, or the fact that it involved grand jurors, does not make it the behavior of a court officer in an official transaction. See *Schmidt* v. *United States*, 124 F. 2d 177 (6th Cir.) which, however, should be read with the earlier case of *Schmidt* v. *United States*, 115 F. 2d 394 (6th Cir.). The official status of the grand jurors is not in question, only the official character of appellant's own status and behavior. I think *Farese* v. *United States*, 209 F. 2d 312 (1st Cir.), particularly at p. 315, and the implications of *In re Michael*, 326 U.S. 324, also support my view that the judgment should be reversed.

[fols. 52-53] UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD I. CAMMER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Fahy and Danaher, Circuit Judges.

JUDGMENT—May 5, 1955

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: May 5, 1955.

Per Circuit Judge Danaher.

Separate dissenting opinion by Circuit Judge Fahy.

[fol. 54] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 110

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 10, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
MAY 3 1955

IN THE

Supreme Court of the United States

October Term, 1954

No. 880

HAROLD I. CAMMER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

Supreme Court of the United States

October Term, 1954

No.

HAROLD L. CAMMER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner, Harold L. Cammer, an attorney at law, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia (R. 52, Appendix A herein), which (Judge Fahy dissenting) affirmed a judgment of the United States District Court for the District of Columbia, entered June 21, 1954, convicting the petitioner of criminal contempt.

Opinions Below

The opinions in the Court of Appeals (R. 35-51, Appendix B herein) are not yet officially reported. They are printed with the judgment at pages 17-34 hereof. The memorandum opinion of the District Court (R. 32a-33a) is reported at 122 F. Supp. 388.

Jurisdiction

The judgment of the court below was dated May 5, 1955 and was entered the same day. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The district court asserted jurisdiction under 18 U. S. C. § 401(2).

Questions Presented

1. Whether it is "misbehavior" under the contempt statute (18 U. S. C. §401) for an attorney, in preparation for a pretrial challenge to the qualifications of grand jurors who returned the indictment, a majority of whom were government employees, and acting in reliance upon recent and direct precedent, to address to such employees, after they had returned the indictment but before they had been discharged, a questionnaire designed solely to ascertain the effect of the loyalty and security programs upon their ability to act impartially in a case involving issues of Communism.

2. Whether such conduct was in an "official transaction" within the meaning of 18 U. S. C. § 401 (2).

3. Whether the petitioner could be adjudged in criminal contempt where the district court found that "it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong," and where it made no finding that petitioner intended to obstruct or did obstruct justice or that he was guilty beyond a reasonable doubt.

Statute Involved

18 U. S. C. (1940) (2):

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . .

"(2) Misbehavior of any of its officers in their official transactions; . . ."

Statement of the Case

The proceeding was instituted in the district court by an order to show cause and supporting petition why petitioner should not be punished for criminal contempt for misbehavior in his official transactions as an officer of the court in violation of 18 U. S. C. (1940) (2) (R. 1a-8a). Petitioner filed an answer (R. 8a-15a) and the case was decided on the pleadings by the District Court, sitting without a jury. The following are the undisputed facts:

Petitioner was attorney for the defendant in *United States* v. *Gold* (Criminal No. 1344-53, D. C., D. Col.) in which Gold was charged with having filed a false non-Communist affidavit under the Taft-Hartley Act.

A majority of the grand jury which had returned the Gold indictment were government employees. Petitioner undertook to prepare a pre-trial motion for a hearing as to the ability of these employees to act impartially, in view of the loyalty and security programs, in a case involving official charges of Communism.

In the light of the decisions of this Court in *United States* v. *Wood*, 299 U. S. 123, *Dennis* v. *United States*, 339 U. S. 162, 171-2, and *Frazier* v. *United States*, 335 U. S. 497, petitioner was faced with the necessity of ascertaining the

existence of bias in the particular case beyond the mere fact of government employment. As the basis for his contemplated motion petitioner therefore sent to the government employees on the grand jury, over his signature, a letter and questionnaire (R. 4a-6a) concerning the effect of the loyalty and security programs upon their ability to act impartially in such a case. *Cf. Morford* v. *United States*, 339 U. S. 258; *Dennis* v. *United States*, 339 U. S. 162, 170, note 4.

The letter did not refer to the facts or merits of the *Gold* case in any way, nor did it contain any suggestion of criticism of the grand jurors. It was copied verbatim, except for names, from a letter on file in the district court in another, unrelated case which had involved the same issue (*United States* v. *Weinberg*, Criminal No. 829-52, D. C., D. Col.). That letter had been sent by Joseph A. Fanelli, a member of the District bar, while serving as Weinberg's counsel, and had been presented by him in support of a motion for a hearing in that case (R. 16a-22a). Petitioner knew that in the *Weinberg* case one district judge had ruled that a motion challenging government-employed grand jurors would not justify a hearing on the subject because Weinberg's counsel had not himself first "contacted" the grand jurors. Petitioner also knew that after Weinberg's counsel had sent a similar questionnaire to the grand jurors the counsel had not been criticized by either the government or the court [1] (R. 10a-12a).

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[1] Mr. Fanelli had received no replies to the questionnaire and had presented this as a reason for invoking the assistance of the court through a hearing. Judge Holtzoff denied the application saying that:

> "Let's look at your questionnaire. Personally, if I were a Grand Juror, I would consider it a presumption if that questionnaire were sent me and I would throw it in the waste basket, in the first place; and in the second place, gentlemen, I think you are overlooking the basic philosophy of a Grand Jury.

The letter which petitioner sent to the government-employed grand jurors read as follows:

> "Dear (Sir) or (Madam):
>
> I am counsel for the defendant, Mr. Ben Gold, in the above-entitled proceeding. I am writing you and all of the other Federal government employees who sat on the Grand Jury which indicted Mr. Gold. I do this in the interest of the fair administration of criminal justice.
>
> In an effort to learn the effect of the loyalty program on jurors from the Federal government, I ask you please to answer the enclosed questionnaire as objectively as possible and return it to me as soon as possible. I am requesting the other grand jurors who are Federal government employees to do the same. The questionnaire does not seek, and I do not want any information concerning the proceedings or deliberations of the Grand Jury on which you sat.
>
> Answering the questionnaire puts you to some unavoidable trouble. But it is, as you will know, your duty as a citizen to help enlighten the court

---

"A petit jury has to be unbiased and to be impartial. A Grand Jury doesn't have to be impartial. In fact, a Grand Jury can start an investigation of its own motion. If it were impartial it couldn't do that.

"The history of the institution of Grand Juries indicate that you may not challenge a Grand Juror for bias as you may a petit juror. Moreover, this indictment was found in May, 1952.

"Let this motion be filed, and denied."

Judge Holtzoff did not suggest that counsel had engaged in any impropriety in sending the questionnaire. The issue concerning the right to a hearing on the showing made was later mooted because of Weinberg's acquittal after trial, but was presented in the *Gold* appeal, now pending in the Court of Appeals.

on an issue which affects the liberty of a citizen on trial in a criminal case.

A self-addressed stamped envelope is enclosed for your convenience. Promptness in your reply is important, and will be appreciated.

Sincerely,

HAROLD I. CAMMER"

The questionnaire enclosed with the letter was based on *Morford* v. *United States, supra*, and *Dennis* v. *United States, supra*. It was a slightly condensed version of the one propounded in the *Weinberg* case and was patterned after one used in a recent study of the effect of the loyalty and security programs on government employees (*Jahoda and Cook, Security Measures and Freedom of Thought: An Exploratory Study of Loyalty and Security Programs*; 61 Yale Law Journal at 331-3). Moreover, petitioner had consulted with Dr. Jahoda, a co-author of that study and Associate Professor of Social Psychology at New York University, in its preparation (R. 12a).

The questionnaire was a necessary prerequisite to an application for a hearing under an existing ruling of the district court. The government had successfully urged in the then recently decided *Emspak* case (*United States* v. *Emspak*, 203 F. 2d 54 [C. A., D. Col., 1952]) and upon oral argument before Judge Kirkland on November 17, 1952 in *Weinberg*, that a defendant who desired a hearing on the qualifications of government employees in such a case was obliged to resort to self-help before applying to the court. The government had urged in *Emspak* that before moving for a hearing the defendant was first obliged himself to

"interview" the individual grand jurors to determine preliminarily whether bias existed in fact.[2]

And in the *Weinberg* case the government had successfully urged that it was necessary that the defendant "contact" the grand jurors as a condition precedent to a motion for a hearing, and Judge Kirkland had adopted this position. He ruled that there was "nothing to prevent counsel, if he sees fit, contacting those 15 members and inquiring only of one subject, whether or not they had any personal bias toward . . . (defendant) and on that account, did they return the indictment" (R. 17a).

At the time Judge Kirkland had made this ruling, the grand jury which had returned the *Weinberg* indictment had not been discharged. At the time that petitioner sent his letter and questionnaire he knew that the grand jury which had returned the *Gold* indictment had not been discharged. Thereafter petitioner, having learned that District Judge Pine had questioned the propriety of the sending of the questionnaire, made a full report of the matter to Judge Pine (R. 23a-27a) and later submitted the letter

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[2] In its *Emspak* brief to the Court of Appeals the government had said (pp. 27-8):

> "The appellant in this motion was not only asserting that at least eight of the twelve members of the grand jury indicated in this motion were prejudiced and disqualified, but was promising to prove it if given the opportunity; *yet, there is not the slightest indication in the long motion and offer of proof that an attempt has been made to interview a single one of the persons.* Under all the circumstances it is clear that the court acted properly in denying the motion for a hearing. In the absence of any reason for appellant not making his whole showing in the usual form of affidavits, it can be asserted on this review that the trial judge had exclusive discretion to deny a hearing. *The appellant was trying to get the court to make an investigation which the appellant should have made himself.*" (Italics supplied.)

and questionnaire to the court in support of a motion for a hearing in the *Gold* case (R. 28a-29a).

Nearly eight months later the government instituted this proceeding. On the hearing it did not dispute that petitioner had relied in good faith on the foregoing direct precedent, on the suggestion contained in the government's brief in *Emspak*, on the ruling of Judge Kirkland and on the acquiescence of Judge Holtzoff and of the United States attorney in the *Weinberg* case. And in its memorandum to the district court, the government conceded that there was no intent by petitioner to influence the grand jury and that no such obstruction of justice occurred.[3] Nor did the government dispute that petitioner had no evil intent.

In its opinion, the district court stated that "it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong." The court added: "There seems to be reason to believe respondent may have misconceived the proprieties. What he did was open. There was no opprobrious personal approach to jurors. There is indication respondent may have believed he had a right to propound the questions at the time he did, notwithstanding this Court is of opinion he had not" (R. 32a-33a).

Nevertheless, the district court found the petitioner guilty but concluded that "under these circumstances, in

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[3] The government's memorandum to the district court said (at p. 8):

"Mr. Cammer disclaims any effort to influence the grand jury. The Government does not charge such an obstruction of justice."

And at page 18:

"Here it is not charged that Mr. Cammer's conduct amounts to an obstruction of justice in that it amounts to influencing a grand juror under Title 18 § 1503 U. S. C."

the absence of a positive declaration by the Court, it may be unjust to severely punish respondent as otherwise would be required." It thereupon imposed a fine of $100.

The memorandum of the district court and the opinions below neither detail nor discuss the defenses set up in petitioner's answer. The court below held that petitioner's conduct was "misbehavior" in an "official transaction." Circuit Judge Fahy dissented.

Reasons for Granting the Writ

1. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States*, 339 U. S. 162, 171-2. See also *United States* v. *Wood*, 299 U. S. 123, at 145, 150.

The criminal code is explicit in prohibiting any communication with a juror, grand or petit, to influence a pending matter. 18 U. S. C. § 1504. But it has never been thought that inquiry into the legal qualifications of a juror is within this prohibited area.[4] Indeed, since an indictment returned by or a trial before an unqualified, biased jury is a denial of due process, this Court has repeatedly held that the way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact. *Dennis* v. *United States, supra*; *Morford* v. *United States*, 339 U. S. 258; *United States* v. *Wood, supra*; *Frazier* v. *United States, supra*.

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[4] The characterization of the questionnaire by the court below and the district courts as "harassing" is squarely contra to *Morford* and *Dennis, supra*. Moreover, if the fact of government employment did not affect the qualifications of the government employees, questions concerning the effect of such employment are harmless. And if such employment affected their qualifications, the integrity of the administration of justice required disclosure of that fact. *Frazier* v. *United States, supra*; *Wood* v. *United States, supra*.

Nevertheless, despite repeated efforts and impressive showings, no defendant has succeeded in obtaining a hearing on the issue of bias of government-employed grand jurors in the District of Columbia. This failure has been due to the government's successful contention that the defendant must show bias beyond the fact of government employment, and that he must resort to self-help by himself interviewing or contacting the jurors before applying to the court for help.

The opinion below therefore constitutes a double trap. On the one hand, it effectively forecloses the only way, under Judge Kirkland's ruling in *Weinberg* and the government's position in *Emspak*, by which the defendant may inquire to discover whether there is a basis for a hearing; on the other, it has stigmatized as a criminal an attorney who performed his obligation in good faith in reliance on precedent the validity of which had not previously been questioned, to meet the standard imposed by the district court. If a defendant may not obtain a hearing unless he first interviews or contacts the grand jurors, and if his attorney is a criminal because he openly and in good faith undertakes the necessary inquiry, then the defendant's right to show disqualification is not preserved; but becomes a snare and delusion. Moreover, if lawyers may not act on a line of cases in this Court consistently and steadfastly adhered to, upon the government's own interpretation of the action required under those cases, upon district court rulings based thereon, and upon the practice of members of the bar consistent therewith, except under peril of a conviction for contempt upon a sudden reversal of the authorities in the contempt proceeding itself, how can they act at all? Whether petitioner's conduct can be condemned as "misbehavior" within the statute under these circumstances is a matter on which this Court should pass.

2. Rule 6(b) of the Federal Rules of Criminal Procedure provides for a challenge to the qualifications of the grand jury at any time, either before or after the return of the indictment and, therefore, before it is discharged. The only condition is the requirement of diligence. *United States* v. *Gale*, 109 U. S. 65; *Burchett* v. *United States*, 194 F. 821 (4th Cir. 1912); *Wright* v. *United States*, 165 F. 2d 405 (8th Cir. 1918); *Redmon* v. *Squier*, 162 F. 2d 195 (9th Cir. 1947).

Having returned the indictment, the grand jury had no further function in the *Gold* case. Therefore it was immaterial that it had not been discharged and was then sitting on other matters. That fact could have no effect upon Gold's right to explore the jurors' qualifications to have acted in his case, where the grand jury was *functus officio*. Otherwise a defendant indicted toward the end of the grand jury term would have the right to explore for the purpose of adducing facts in support of the challenge, but one indicted early in the term would be denied that right. Since grand juries may sit for eighteen months, the right to prepare a challenge in such a case would be effectively nullified. For on the one hand, under Judge Kirkland's ruling, the defendant was first obliged to interview or contact the grand jurors to determine whether a basis for the challenge existed, and on the other he was faced with the need of filing a challenge within the time allowed for motions. And, as noted, Judge Kirkland's ruling was made at a time when the grand jury had not been discharged.

Thus the issues here presented raise important questions respecting the way in which an attorney for a defendant in a criminal case may prepare a pre-trial test of the qualifications of the grand jury which returned the indictment in an area where the problem constantly recurs and which is of vital importance to the administration of criminal justice.

3. In *Nye* v. *United States*, 313 U. S. 33, this Court, expressly overruling *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, firmly laid to rest the "reasonable tendency" test by which the contempt statute has been previously construed and applied. Since *Nye* this Court has consistently reaffirmed the view that the statute was intended drastically to limit the power of the courts to punish for crime without indictment or jury trial. *In re Michael*, 326 U. S. 224, 227; *Bridges* v. *California*, 314 U. S. 252, 264; *Pennekamp* v. *Florida*, 328 U. S. 331, 344; *Craig* v. *Harney*, 331 U. S. 367, 372.

The majority below has departed from these holdings in several critical respects.

(a) On the authority of *Ex parte Bradley*, 7 Wall., at 374, it has made the test of "official transaction" turn on whether the "actions occurred when he was directly engaged 'in the practice of the profession.'" This vague test, extracted from a case where an attorney assaulted a judge in the courtroom, is in conflict, as Judge Fahy points out, with the narrow meaning which this Court has accorded to that phrase in *In re Michael*, 326 U. S. 224, at 229, and to the holdings of the First and Sixth Circuits in *Farese* v. *United States*, 209 F. 2d 312, at 315 (1st Cir., 1954), and *Schmidt* v. *United States*, 124 F. 2d 394 (6th Cir., 1941).[5]

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[5] The court below erroneously read *Schmidt* as "primarily" concerned with the first rather than the second subsection of 18 U. S. C. § 401. There an attorney had his client obtain from grand jurors affidavits concerning their proceedings and deliberations and filed them in support of a motion to quash the indictment. He was convicted of contempt "for filing these affidavits contrary to and in violation of the oath of said grand jurors, without application to or permission from the Court at the time when said grand jurors were subject to recall and had not been discharged." The Court held that the conduct was not "misbehavior" in an "official transaction" within the second subsection and it placed no primary emphasis on the first subsection.

(5) The opinion of the majority below implies vitality in a series of cases bottomed on the "reasonable tendency" rule of *Toledo Newspaper* which was cast out by *Nye*. *Sinclair* v. *United States*, 279 U. S. 749, although entirely distinguishable on the facts, expressly rested on the *Toledo* rule which *Nye* overruled. *Ex parte Bradley*, *supra*, decided in 1868, contains dicta of questionable validity in the light of *Nye*. *Tanner* v. *United States*, 62 F. 2d 601 (10th Cir., 1933), a case where an attorney, in the courthouse, berated a juror because he had returned an inadequate verdict, was decided eight years before *Nye*. *Di Farese* v. *United States*, *supra*.

(c) This Court has held that criminal intent is a material and essential ingredient of the crime of criminal contempt and must be proved beyond a reasonable doubt in order to sustain a conviction. *Ex parte Hudgings*, 249 U. S. 378; see also *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418. See also *Blim* v. *United States*, 68 F. 2d 483 (7th Cir., 1934), and the cases there cited at 487. It has further repeatedly held that obstruction must clearly be shown in every case where the contempt power is exerted. *In re Michael*, *supra*; *Ex parte Hudgings*, *supra*.

The district court did not find an obstruction of justice. The government conceded that there was no intent or effort to influence the grand jury.[6] Thus the court below has so far departed from constitutional standards as to sanction a summary conviction of crime in a case where proof of an essential ingredient of the offense was not established beyond a reasonable doubt.

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[6] See footnote 3, *supra*. However, the majority below wrote that "it is immaterial whether Cammer was motivated by an evil purpose, or not, but were we pressed on the point we could readily find that he was." The district court had found that it was in doubt that petitioner had an evil intent. Since the case was before the Court of Appeals on the petition and answer, and in view of the government's concessions, we submit that there is absolutely no basis for the majority's suggestion.

4. The District Court commenced its opinion with the following:

> "Nothing has changed its understanding that whenever a case is pending before judge or jury, no pressure or harassment of any character should be exercised on one who must make a decision. Unfortunately within late years there has been a tendency to bring such pressures and harassment. For a time, there was picketing of courts during trials. Then there came about unseemly conduct of counsel in court, requiring disciplining of counsel. Now it appears searching questionnaires have been submitted to grand jurors while they are considering certain types of cases."

Thus the court below has affirmed the criminal stigmatization of the petitioner under circumstances which strongly suggest that the petitioner was prejudiced before the district court because he appeared in that "certain type of case" where his client was charged with a crime related to Communism. Petitioner has had nothing to do with picketing any courts. Nor has he engaged in unseemly conduct in court or elsewhere requiring his discipline.[7] And "searching" inquiry as to the qualifications

[7] It is appropriate to observe that at the conclusion of the *Gold* case, Judge McLaughlin who had presided at the trial, commented on the high professional standards observed and the care and thoroughness with which defense counsel had conducted the defense as follows (Gold transcript for April 27, 1954, p. 70):

> "This case consumed, as counsel knows a period of six weeks in trial. It was a very vigrously contested case, one in which counsel on both sides expertly represented their respective clients. And the Court is not aware of another case in which the Court has participated in which every conceivable question was more carefully raised, and rulings thereon more carefully preserved in the record. The Court can do no less than commend counsel for their zeal in their representation of their respective clients."

of jurors cannot be assimilated to picketing a trial or indecorous conduct. Indeed, this Court has often said that such inquiry is essential to the fair administration of criminal justice. *Morford* v. *United States*, 339 U. S. 258; *Dennis* v. *United States*, 339 U. S. 162, 170, note 4.

The problem of obtaining counsel, and the sanctions and pressures against counsel, in cases involving issues of Communism are a serious problem in the administration of justice. This Court should not permit an implication that an attorney has been convicted because of the political views attributed to his client, or because of the conduct of others in cases involving Communism. Nor should this Court allow an attorney to be held guilty of criminal contempt when, acting in good faith, he followed a course insisted upon by the government in previous cases and for which direct and recent precedent existed.

CONCLUSION

The writ of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

CHARLES E. FORD,
416 Fifth Street, N.W.,
Washington, D. C.,
Counsel for Petitioner.

APPENDIX A

Judgment Appealed From

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12353 April Term, 1953

HAROLD I. CAMMER,

Appellant;

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before:

WILBUR K. MILLER, FAHY and DANAHER,

Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: May 5, 1955.

Per Circuit Judge DANAHER.

Separate dissenting opinion by Circuit Judge FAHY.

APPENDIX B

Opinions in Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12353

HAROLD I. CAMMER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided May 5, 1955

Mr. CHARLES E. FORD for appellant.

Mr. OLIVER GASCH, Assistant United States Attorney, with whom Messrs. LEO A. ROVER, United States Attorney, and LEWIS CARROLL, Assistant United States Attorney, were on the brief, for appellee.

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

DANAHER, Circuit Judge: Cammer appeals from an order adjudging him guilty of criminal contempt. The essential facts are that Cammer is attorney of record for one Gold; on August 28, 1953, an indictment was returned

against Gold by the May 1953 grand jury; the grand jury after Gold's indictment subpoenaed other persons represented by Cammer: on September 22, 1953, Cammer appeared in the District Court on behalf of these other persons and moved to quash and vacate the subpoenas served upon them; on this same day and the day following, September 22 and 23, 1953, Cammer sent identical letters and questionnaires to some fifteen members of the grand jury who were federal employees, and in so doing, Cammer acted without the permission or knowledge of the District Court. The questionnaires related in general to the effect of the government's loyalty program on the grand jurors. The letter accompanying the questionnaire stated that it was being submitted "in the interest of the fair administration of criminal justice" and urged that it was the recipient's "duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case."

The trial judge found that the questionnaires harassed the jurors and impinged upon their freedom of thought and decision. He described Cammer's action as "intolerable" but concluded that a fine of $100 would be sufficient punishment since there was some doubt as to whether Cammer's acts "were committed in conscious wrong."

Cammer's contempt was adjudged specifically under § 401 of the Federal Contempt Statute, 18 U. S. C. § 401 (1952),[1] which provides as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

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[1] Although *Nye* v. *United States*, 313 U. S. 33 (1941), involves a complaint for violation of the first subsection of 18 U. S. C. § 401, at page 44 *et seq.* is presented important background material. Earlier treatment of the derivation of the statute is presented by Mr. Justice Harlan in Savin, Petitioner, 131 U. S. 267, 274 *et seq.* (1889).

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The government's application for an order to show cause was predicated upon acts and conduct said to constitute a violation of subsection (2) of the foregoing section. Although appellant set up certain defenses which will not be detailed, his answer admitted all allegations of the government's petition except the following:

"The acts and conduct of Harold I. Cammer, as set forth in the foregoing paragraphs, constitute:

"Misbehavior by an officer of this Court in his official transactions with this Court, in violation of section 401, Title 18 U. S. C."

The power of Congress to legislate with respect to the contempt powers of the federal courts, other than the Supreme Court, is not open to question. "These courts were created by acts of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted." *Ex parte Robinson*, 19 Wall. 505, 510-511 (U. S. 1873). The contempt statute has been described as an attempt by Congress "drastically" to limit the contempt powers of the courts. *In re Michael*, 326 U. S. 224, 227 (1945); *Nye* v. *United States*, 313 U. S. 33, 44-48 (1941). The *Michael* and *Nye* cases emphasize, however, that the

main concern of Congress and the Supreme Court is not to protect contemptuous conduct, but to prevent abuses which may result from summary punishment.

Under the terms of 18 U. S. C. § 401(2), we inquire whether: (1) Cammer was an officer of the court, (2) engaged in an official transaction, (3) whose conduct constituted misbehavior. For the reasons which follow, the majority answers these questions affirmatively, though with great respect for the contrary views of our colleague.

1. *Cammer was an officer of the court.*

It seems clear that attorneys are officers of the court within the intendment of the statute. In *Ex parte Garland*, 4 Wall. 333, 378 (U. S. 1866), Justice Field said: "[Attorneys] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." See also, *Ex parte Robinson*, 19 Wall. 505, 512 (U. S. 1873); *Ex parte Bradley*, 7 Wall. 364, 374 (U. S. 1868), and *Tanner* v. *United States*, 62 F. 2d 601 (10th Cir. 1932), *cert. denied*, 289 U. S. 746 (1933), all of which involved contempt situations.[2]

[2] No point is made of the fact that the District Court admitted Cammer only *pro hac vice*. This would appear to be immaterial since the alleged contempt occurred in connection with the specific cases in which he was authorized to appear. See *Bowles* v. *United States*, 50 F. 2d 848, 851 (4th Cir. 1931), *cert. denied*, 284 U. S. 648 (1931).

2. *Cammer was engaged in an official transaction.*

That Cammer, as an "officer of the court," was engaged in an official transaction is clear. The facts show beyond dispute that Cammer's actions occurred while he was directly engaged "in the practice of the profession." *Ex parte Bradley, supra*, 7 Wall. at 374. The grand jury had just indicted one of his clients, and as he knew, currently had others under investigation. Each letter identified Cammer as attorney for the indicted client, Gold, and stated that he was addressing it to all federal government employees "who sat on the Grand Jury which indicted Mr. Gold." Cammer's letter, appealing directly to the grand jurors' purported duty "to help enlighten the court," transmitted a questionnaire containing inquiries, a few samples of which will demonstrate its inevitable impact on the grand jurors.[3]

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[3] "In what department of the Federal Government are you employed?

* * *

"Do you think that it is wise or safe for a government employee to express views on a controversial question different from the position of the Government?

* * *

"Do you think a government employee could get into trouble if he gave a truthful character affidavit for use at a hearing in which the fellow employee is charged with disloyalty to his Government?

* * *

"Are you involved in a loyalty proceeding? Have you ever been involved in such a proceeding?

"Are you concerned about possible involvement in a loyalty proceeding in the future?

"Do you believe that a government employee might some day have to explain his action in a loyalty proceeding if, as a juror, he voted to acquit or not to indict a person who was widely publicized as a past or present communist?

* * *

Appendix B

The grand jury is an appendage of the court and "proceedings before it are to be regarded as being proceedings in the court." *Camarota v. United States*, 111 F. 2d 243, 246 (3d Cir. 1940), *cert. denied*, 311 U. S. 651 (1940). See also, *United States v. Smyth*, 104 F. Supp. 283, 291 (N. D. Cal. 1952). The grand jury acts "under the authority of the court," we note in *Savin, Petitioner*, 131 U. S. 267, 277 (1889), which predicated Justice Cardozo's pronouncements "A talesman when accepted as a juror becomes a part or a member of the court," *Clark v. United States*, 289 U. S. 1, 11 (1933), and again at page 12, "A talesman, sworn as a juror, becomes, like an attorney, an officer of the court, and must submit to like restraints." That Cammer, in so communicating with an official arm of the court while conducting the court's business, was engaged in an official transaction cannot be doubted.

In urging that the statute does not apply in such circumstances appellant relies on the *Nye, Michael* and second *Schmidt* (124 F. 2d 177 (6th Cir. 1941)) cases. The *Nye* proceedings, brought under the *first* subsection of 18 U. S. C. § 401, did not involve an officer of the court, and the alleged contemnors, in fact, were not even parties to the litigation. The Court's opinion stated, 313 U. S. at 44: "The question is whether the conduct of petitioners constituted 'misbehavior . . . so near' the present of the court 'as to ob-

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"Do you think that such a vote might affect his employment status in any way, such as possible promotions, assignments, or selection for layoff in the current reductions in force? If so, how?

"Do you believe that a government employee's obligation to the Federal Government and to its program of fight communism would be consistent with his voting to acquit or refuse to indict a man officially charged by our Government with communist activity?

* * *

"Did you mention to or discuss the receipt of this questionnaire with any attorney or representative of the Department of Justice or with your superiors on your job? If so, with whom?"

struct the administration of justice . . . ." Concluding that the words have a geographical connotation, the majority ruled that the reprehensible conduct was not punishable as contempt within the mean of § 401(1) though of a kind which corrupts the judicial process and impedes the administration of justice. The case on its facts has nothing to do with our problem. In the *Michael* case, *supra*, the contemnor, a court appointed trustee had been adjudged guilty of contempt because of "false and evasive" testimony before a grand jury. The issues were not unlike those presented in *Ex parte Hudgings*, 249 U. S. 378 (1919). The Court noted that perjury alone does not constitute an "obstruction" of justice within § 401(1), and that element must be clearly shown where contempt is charged. The opinion cited *Clark* v. *United States*, *supra*, as an example of obstruction where a prospective juror had falsely testified in order to qualify. "It is difficult to conceive of a more effective obstruction to the judicial process, than a juror who has prejudged the case," wrote Justice Black, 326 U. S. at 228, pointing out further that "the mere fact that false swearing is an incident to the obstruction charged does not immunize the culprit from contempt proceedings." But perjury alone did not predicate contempt proceedings under § 401(1), nor could the conviction be sustained under § 401(2) where the contemnor, though an officer of the court, was not engaged in an official transaction while testifying generally before the grand jury. In short, where the charge of perjury could be prosecuted with determination of guilt by a jury, that course, rather than summary contempt action, should be followed where there was lacking the element of obstruction of justice. The *Michael* case offers no comfort to one who either sought to influence the jury as it transacted its business, or whose insinuating and unauthorized communications might have

affected the grand jury's official consideration of the case against Cammer's clients.[4] In the second *Schoridt* case, as is clear from the facts which appear in the court's first opinion (115 F. 2d 394), the court again was concerned primarily with the first, rather than the second subsection of 18 U. S. C. § 401. In fact, it was stated in open court by the Government that no complaint was made in that case under the second subsection. Moreover, while attorneys were involved, they did not themselves make contacts with grand jurors, and their alleged contempts occurred when the court was not in session and grew out of actions they advised the clients to take. In brief, the cases relied upon by appellant may be distinguished, and none involves direct dealing between two officers of the court in a matter of official concern to both, as in the present situation.

3. *Cammer's conduct constituted misbehavior.*

For many practical reasons the courts have sought to protect grand juries in the exercise of their historic and important function, investing their deliberations with the seal of secrecy, protecting the jurors against harassment and otherwise recognizing their valued contributions in

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[4] *Cf. Remmer* v. *United States*, 347 U. S. 227, 229 (1954), where the Court said: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions . . ."

judicial administration." Thus has evolved the rule requiring judicial approval of proposals to penetrate the shield. *Schmidt* v. *United States*, 115 F. 2d 394, 397 (6th Cir. 1940), and cases there cited. See also, *United States* v. *American Medical Ass'n*, 26 F. Supp. 429 (D. D. C. 1939); *In re Bullock*, 103 F. Supp. 639 (D. D. C. 1952)."[6]

Cammer cast aside an unusually convenient opportunity to consult with the judge about his contemplated action when while attorney for Gold who had been indicted, he appeared before the court on the morning of the very day the questionnaires were sent out. He there sought to quash a subpoena duces tecum running to one of Gold's associates, and he knew that the grand jury was continuing its investigation. If he had acted in good faith, he could then have sought judicial supervision, instead of which he went forward with his plan, kept it secret to himself, acted without advice from the court, and yet implied in his letter that it was the jurors' "duty" to the court to respond to the questionnaires.

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[5] E.g., a defendant should not be permitted "to divert and turn back the course of a criminal case from a trial of himself to a trial of the grand jury and the prosecuting officers." *United States* v. *American Medical Ass'n*, 26 F. Supp. 429 (D.D.C. 1939); *United States* v. *Smyth*, 104 F. Supp. 283, 300-302 (N.D. Cal. 1952); *cf. Bradley* v. *Fisher*, 13 Wall. 335, 347-348 (U. S. 1871); *Atwell* v. *United States*, 162 Fed. 97, 100 (4th Cir. 1908).

[6] In the latter case, by the way, the reasons for secrecy are summarized as follows: "1. To prevent the escape of those indicted; 2. To insure the grand jury freedom in its deliberations; 3. To prevent any persons from annoying the grand jurors; 4. To prevent subornation of perjury with witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; 5. To encourage free and untrammeled disclosures by persons who have some information with respect to the commission of crimes, and, 6. To protect the innocent person who is accused but exonerated, from the disclosure of the fact that he has been under investigation." See also, *United States* v. *Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D. Md. 1931).

Appendix B

The record here amply substantiates a finding of misbehavior. As Judge Laws said in his opinion: "To harass [the jurors] by challenging and lengthy questions while they are deliberating or about to consider cases is intolerable. A timid juror will not fail to be disturbed, possibly influenced. A stalwart juror at least will be disturbed. Such an approach impinges freedom of thought and decision. Jurors will not serve competently if so harassed." Conduct similar in principle to that involved here, has been condemned in many other cases.

In *Sinclair v. United States*, 279 U. S. 749, 765 (1929), the defendants in a criminal case had the jurors kept under surveillance whenever they were not actually within the court house. Investigations also were made concerning encumbrances on the home of one juror and to determine whether another had indicated his views during the trial. The Court upheld an adjudication of criminal contempt on these facts, even though it did not appear that any juror had actualy been approached or communicated with or that any juror was conscious of the surveillance, although some jurors were suspicious. The punishment included heavy fines and imprisonment. Commenting on the conduct of the contemnors, the Court said (279 U. S. at 764-765):

> "That the acts here disclosed, and for which three of the appellants were certainly responsible, tended to obstruct the honest and fair administration of justice we cannot doubt. The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law. The most exemplary resent having their footsteps dogged by private detectives. All know that men who accept such employment commonly lack fine scruples, often

wilfully misrepresent innocent conduct and manufacture charges. The mere suspicion that he, his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility. . . . We can discover no reasons for emasculating the power of courts to protect themselves against this odious thing."

In *Ex parte Bradley*, 7 Wall. 364, 374 (U. S. 1868), the Court reversed a contempt adjudication against an attorney which had been premised on the first clause of the first section of the Act of March 2, 1831, which is the equivalent of 18 U. S. C. 401(1). In so doing, however, the Court markedly contrasted the power of the courts under like circumstances "to punish attorneys as officers of the same, for misbehavior in the practice of the profession." With respect to this latter power, Mr. Justice Nelson speaking for the Court said (7 Wall. at 374):

"This power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein. If guilty of fraud against their clients, or of stirring up litigation by corrupt devices, or using the forms of law to further the ends of injustice; in fine, for the commission of any other act of official or personal dishonesty and oppression, they become subject to the summary jurisdiction of the court. Indeed, in every instance where an attorney is charged by affidavit with fraud or mal-

> practice in his profession, contrary to the principles of justice and common honesty, the court, on motion, will order him to appear and answer, and deal with him according as the facts may appear in the case. . . . [T]his is a distinct head of proceeding from that of contempt of court, or of the members thereof, committed in open court, or in immediate view and presence, tending to interrupt its processings, or to impair the respect due to its authority. *This distinction is recognized in the act of 1831, already referred to, which, after providing for personal contempt in presence of the court, authorizes attachments to issue, and summary punishment to be inflicted, for 'the misbehavior of the officers of said courts in their official transactions.'* " (Emphasis supplied.)

In *Tanner v. United States*, 62 F. 2d 601 (10th Cir. 1933), *cert. denied*, 289 U. S. 746 (1933), an attorney after the jury returned its verdict in a case in which he was participating, encountered one of the jurors and proceeded to abuse the juror, who was a banker, for the small amount of damages awarded his client in the trial. The lawyer was adjudged in contempt, was fined $100, and suspended from practice until payment was made. The Court of Appeals upheld this conviction and made this pertinent comment (62 F. 2d at 602):

> "While the jury had returned a verdict in the Woody case in which the juror had sat, he was still an officer of the court and would be called in subsequent cases. Appellant also was an officer of the court. The attack having been made by one officer of the court upon another because of the subject matter of a trial concluded only so far as the return of a verdict by the jury, we are of the opinion while the attack was made outside of the courtroom and after

the jury had returned its verdict, yet the case was still pending, and it was not only the right but the duty of the court to deal with the same. It is unthinkable a court should be so weak or supine, so wanting in constitutional power, as to not be able to protect its officers in the proper discharge of their sworn duty. That a juror, acting under his sworn duty in the administration of justice in one of our national courts, should be so basely accused and humiliated by an interested officer of the court, cannot be thought not to be included in the statutory law above quoted. No doubt jurors, if such conduct as is found in this record should go unpunished, would fear to do their sworn duty in an honest, impartial manner, as must be done in the administration of justice in our courts. We are of the opinion the judgment imposed for the offense by the attorney in this case was well within the statutory power conferred. Aside from this, the court was very moderate in his punishment, and for that the court is to be commended and not criticized for its timely action in this case."

In the first *Schmidt case*, *supra*, 115 F. 2d 394 (6th Cir. 1940), several attorneys advised their clients that they could interrogate members of the grand jury relative to the evidence which had been submitted to it, and upon which indictments against them were based. The clients thereupon approached and interviewed a number of the grand jurors, and obtained affidavits which the attorneys submitted to the court in support of motions to quash the indictments. The attorneys were adjudged in contempt of court for their conduct. Commenting upon the attorneys' action, the court said (115 F. 2d at 396):

"The question of sincerity aside, the fact is that appellants' advice overlooked this oath and caused

their clients and the grand jurors themselves to disregard it. The advice was given directly in the teeth of that clause of the oath which obligated the jurors to secrecy unless they were called upon in a court of justice to make disclosures, and of that portion of the court's charge to the grand jury hereinabove quoted. Advice which caused appellants' clients or the jurors themselves to disregard or ignore the oath was, per se, an unlawful interference with the proceedings of the court, and, however honestly given, was at least a technical contempt."[7]

Cammer urges upon us his alleged lack of intent, that there was an absence of conscious wrong. His reliance upon any such ground for exculpation is definitely misplaced. "In order that one may be held for contempt for communications with jurors, on the ground of the harmful tendency thereof, it is not necessary to prove that the communications had or the acts done were accompanied with a wrongful intent. It is sufficient if such acts and communications were knowingly and wilfully done and had, and had the tendency to influence improperly the action of the jury." *Kelly v. United States*, 250 Fed. 947, 950 (9th Cir. 1918), *cert. denied*, 248 U. S. 585 (1919). In *Duke* v. *United States*, 90 F. 2d 840 (4th Cir. 1937), *cert. denied*, 302 U. S. 685 (1937), which arose under a statute which now appears at 18 U. S. C. § 1504 (1952), the defendant was charged with improperly communicating with a grand jury. Rejecting as a matter of law the defense that

[7] See also the exhaustive opinion of Chief Judge Fee in *United States* v. *Smyth*, 104 F. Supp. 283, 303-304 (N.D. Cal. 1952), in which he indicated that it would be contempt under 18 U. S. C. § 401 for an attorney, without a court order, to interrogate grand jurors about their motives or personal habits; and *In re Grand Jury Proceedings*, 4 F. Supp. 283 (E.D. Penn. 1933), which also indicates that a court order is necessary in order to avoid contempt in questioning grand jurors.

he had acted "openly and without corrupt intent," the court said that under the facts of the case "the only question which can arise under the statute is whether the person accused of sending the letter did so. Every one is presumed to intend the natural and probable consequences of acts intentionally done." Once we find, as we do, that Cammer's conduct tended to harass the grand jurors, it is immaterial whether Cammer was motivated by an evil purpose, or not, but were we pressed on the point we could readily find that he was.

We are not unmindful that "the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed. . . ." *Cooke* v. *United States*, 267 U. S. 517, 538 (1925). Here the appellant had the full benefit of whatever mitigating circumstances could properly be urged in the light of the facts. The *Cooke* case requires no more. See also, *Merrimack River Sav. Bk.* v. *Clay Center*, 219 U. S. 527, 536 (1911); *Schmidt* v. *United States*, 115 F. 2d 394, 398 (6th Cir. 1940).

Chief Judge Laws concluded: "Granting respondent all favorable inferences, his acts clearly disregarded the protection which must be vouchsafed jurors. The Court finds him guilty of contempt and imposes a fine of $100."

The judgment is affirmed.

FAHY, *Circuit Judge, dissenting*: The question is the narrow one whether the conduct for which appellant was adjudged by the court guilty of criminal contempt was that of an officer of the court in an official transaction. The only authority invoked to support the judgment is 18 U. S. C. 401(2) (1952), empowering a court of the United States to punish by fine or imprisonment such contempt of its authority "and none other, as . . . (2) Misbehavior

of any of its officers in their official transactions . . . ." I assume the conduct was misbehavior within the meaning of this provision. And, of course, appellant as a member of the bar is an officer of the court. *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 378; *Savings Bank* v. *Ward*, 100 U. S. 195, 198; *Powell* v. *Alabama*, 287 U. S. 45, 73; *Hickman* v. *Taylor*, 329 U. S. 495, 510;[1] *Booth* v. *Fletcher*, 69 App. D. C. 351, 355, 101 F. 2d 676, 680, *cert. denied*, 307 U. S. 628. But when he communicated by mail with grand jurors to obtain information in preparing his client's case he was not engaging in an official transaction as an officer of the court. In other words, I do not think Congress intended by § 401(2), to grant courts the power by summary proceedings to police such professional behavior of a member of the bar. The well known avenues for suspending, disbarring, or otherwise disciplining attorneys are available to reach their unprofessional and unethical conduct. The criminal law is available to punish them for criminal offenses, where they "will be afforded the normal safeguards surrounding criminal prosecutions." *Nye* v. *United States*, 313 U. S. 33, 53.[2] And contempt proceedings are also available to punish "[m]isbehavior of any person" in the court's presence or "so near thereto as to obstruct the administration of justice", or "[d]isobedience or resistance to" the court's "lawful writ, process, order, rule, decree, or command." 18 U. S. C. § 401(1) and (3) (1952). But the language of § 401(2), "[m]isbehavior of" court officers "in their official transactions", is not apt wording to include a broad sweep of professional behavior of attorneys not in the presence of the court or "so near thereto as to obstruct the administration of justice."

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[1] For subsequent history see *Hickman* v. *Taylor*, 170 F. 2d 327 (3rd Cir.), *cert. denied*, 336 U. S. 906.

[2] For subsequent history see *Nye* v. *United States*, 137 F. 2d 73 (4th Cir.), *cert. denied*, 320 U. S. 755.

The language no doubt does apply to the official conduct of officers of the court, such, for example, as the clerk and marshal; and to referees, trustees, masters, and attorneys in special capacities. Summary power to punish them might have been thought necessary to enable a court to function with propriety and integrity. But to construe § 401(2) to include the conduct here in question is to draw into the words "official transactions" of "officers" of the court an undefined and vague area of the professional activity of an attorney. This is not the ordinary meaning of the language and we should not, in view of *Nye v. United States*, *supra*, extend its meaning beyond the ordinary. Unless the requirements of the statute are clearly satisfied, "an offense will be dealt with as the law deals with the run of illegal acts", *ibid.*, 313 U. S. at p. 51, and not by summary procedure without the protection of the Bill of Rights.

Ex parte Bradley, 74 U. S. (7 Wall.) 364, lends some support to the view of the majority. But the question in its present context was not there decided, and the opinion must now be read in the light of *Nye* v. *United States*, *supra*. See, also, the recent decision in *Offutt* v. *United States*, 348 U. S. 11, 14.

It must be remembered that the seriousness of the behavior, or the fact that it involved grand jurors, does not make it the behavior of a court officer in an official transaction. See *Schmidt* v. *United States*, 124 F. 2d 177 (6th Cir.), which, however, should be read with the earlier case of *Schmidt* v. *United States*, 115 F. 2d 394 (6th Cir.). The official status of the grand jurors is not in question, only the official character of appellant's own status and behavior. I think *Farese* v. *United States*, 209 F. 2d 312 (1st Cir.), particularly at page 315, and the implications of *In re Michael*, 326 U. S. 224, also support my view that the judgment should be reversed.

SUPREME COURT, U.S.
FILED
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 110

HAROLD I. CAMMER,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinions of the Court of Appeals (R. 27-41) are reported at 223 F. 2d 322. The memorandum opinion in the District Court (R. 25-26) is reported at 122 F. Supp. 388.

Jurisdiction

The judgment of the Court of Appeal was entered on May 5, 1955 (R. 42). The petition for a writ of certiorari was granted on October 10, 1955 (R. 42). This Court has jurisdiction under 28 U. S. C., Section 1254(1).

Statute Involved

18 U. S. C. § 401(2):

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion,

such contempt of its authority, and none other, as * * *

"(2) Misbehavior of any of its officers in their official transactions; * * *"

Questions Presented

1. Whether it is "misbehavior" constituting criminal contempt for an attorney, relying upon recent and direct precedent, in preparation for a pretrial challenge to the qualifications of grand jurors who had returned the indictment (a majority of whom were government employees), to address to such employees, after they had returned the indictment but before they had been discharged, a questionnaire designed solely to ascertain the effect of the loyalty and security programs upon their ability to act impartially in a case involving issues of communism.

2. Whether such conduct was in an "official transaction" within the meaning of the statute.

3. Whether the petitioner could be adjudged in criminal contempt where the District Court found that "it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong," and where it made no finding that petitioner intended to obstruct or did obstruct justice or that he was guilty beyond a reasonable doubt.

Statement of the Case

On June 15, 1954, petitioner was convicted in the United States District Court for the District of Columbia of criminal contempt for misbehavior in an official transaction as an officer of the court in violation of 18 U. S. C. 401(2). The proceeding had been instituted by an order to show cause issued on petition of the United States Attorney

(R. 1-7). Petitioner filed a verified answer (R. 7-13) There being no dispute as to the facts, the case was decided on the pleadings by the District Court, which sat without a jury.

The facts giving rise to the conviction are as follows: Petitioner was defense attorney in *United States* v. *Gold* (Crim. No. 1344-53, D. C., D. Col.) in which Gold was charged with having filed a false non-Communist affidavit under the Taft-Hartley Act.

A majority on the grand jury which had returned the Gold indictment were government employees. Petitioner undertook to prepare a pre-trial motion for a hearing as to the ability of these employees to act impartially, in view of the loyalty and security programs, in a case involving official charges of communism.

In the light of the decisions of this Court in *United States* v. *Wood*, 299 U. S. 123, *Dennis* v. *United States*, 339 U. S. 162, 171-2, and *Frazier* v. *United States*, 335 U. S. 497, petitioner was faced with the necessity of ascertaining the existence of bias in the particular case beyond the mere fact of government employment. As the basis for his contemplated motion petitioner therefore sent to the government employees on the grand jury a letter and questionnaire (R. 3-6) concerning the effect of the loyalty and security programs upon their ability to act impartially in such a case. *Cf. Morford* v. *United States*, 339 U. S. 258; *Dennis* v. *United States*, 339 U. S. 162, 170, note 4.

The letter was on petitioner's letter-head and over his signature and contained a self-addressed stamped return envelope. It did not refer to the facts or merits of the *Gold* case in any way, nor did it contain any suggestion of criticism of the grand jurors. It was copied verbatim, except for names, from a letter which was then on file in the District Court in another, unrelated case which had involved a similar issue (*United States* v. *Weinberg*, Crimi-

No. 829-52, D. C., D. Col.). From his study of the *Weinberg* case, petitioner had learned that in that case a motion for a hearing on the qualifications of government-employed grand jurors had been denied by a judge of the District Court for the District of Columbia, because Weinberg's counsel had failed, before moving for a hearing, to "contact" the grand jurors to ascertain whether actual bias existed (R. 13-15); that Weinberg's counsel, Joseph A. Fanelli, a member of the District bar, had thereupon sent an identical letter and a similar questionnaire to the grand jurors without the prior knowledge or authority of the Court (R. 15-18); that Mr. Fanelli had then presented them in support of a renewed motion for a hearing, and that he had not been criticized by either the government or the court.[1]

---

[1] Mr. Fanelli had received no replies to the questionnaire and had presented this as a reason for invoking the assistance of the court through a hearing. Judge Holtzoff denied the application saying that:

> "Let's look at your questionnaire. Personally, if I were a Grand Juror, I would consider it a presumption if that questionnaire were sent me and I would throw it in the waste basket, in the first place; and in the second place, gentlemen, I think you are overlooking the basic philosophy of a Grand Jury."
>
> "A petit jury has to be unbiased and to be impartial. A Grand Jury doesn't have to be impartial. In fact, a Grand Jury can start an investigation of its own motion. If it were impartial it couldn't do that.
>
> "The history of the institution of Grand Juries indicate that you may not challenge a Grand Juror for bias as you may a petit juror. Moreover, this indictment was found in May, 1952.
>
> "Let this motion be filed, and denied."

Judge Holtzoff did not suggest that counsel had engaged in any impropriety in sending the questionnaire. The issue concerning the right to a hearing on the showing made was later mooted because of Weinberg's acquittal after trial, but was presented in the *Gold* appeal, now pending in the Court of Appeals.

The letter which petitioner sent to the government-employed grand jurors read as follows:

"Dear (Sir) or (Madam):

I am counsel for the defendant, Mr. Ben Gold, in the above-entitled proceeding. I am writing you and all of the other Federal government employees who sat on the Grand Jury which indicted Mr. Gold. I do this in the interest of the fair administration of criminal justice.

In an effort to learn the effect of the loyalty program on jurors from the Federal government, I ask you please to answer the enclosed questionnaire as objectively as possible and return it to me as soon as possible. I am requesting the other grand jurors who are Federal government employees to do the same. The questionnaire does not seek, and I do not want any information concerning the proceedings or deliberations of the Grand Jury on which you sat.

Answering the questionnaire puts you to some unavoidable trouble. But it is, as you will know, your duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case.

A self-addressed stamped envelope is enclosed for your convenience. Promptness in your reply is important, and will be appreciated.

Sincerely,

HAROLD I. CAMMER"

The questionnaire enclosed with the letter was based on *Morford* v. *United States*, *supra*, and *Dennis* v. *United States*, *supra*. It was slightly condensed from the one propounded in *Weinberg* which was patterned after one used in a then recent study of the effect of the loyalty and security programs on government employees (Jahoda

and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of Loyalty and Security Programs*, 61 Yale Law Journal at 331-3; R. 10).

The questionnaire was a necessary prerequisite to an application for a hearing under two existing rulings of the District Court, *United States* v. *Emspak*, 95 F. Supp. 1010, 1012, affd. 203 F. 2d 54 (C. A., D. Col. 1952), rev'd on other grounds, 349 U. S. 190; *United States* v. *Weinberg*, *supra*, in which defendants had been denied hearings because, as the government successfully urged, they had failed, before applying to the court, to conduct their own preliminary investigations of the grand jurors to ascertain whether a basis for a hearing existed. Petitioner had examined the decisions, briefs and records in both these cases in preparation of his contemplated motion (R. 9).

In *Emspak*, the government had urged that the defendant could not move for a hearing unless he had himself first made an attempt to "interview" the individual grand jurors to determine preliminarily whether bias existed in fact. In its *Emspak* brief to the Court of Appeals the government said (pp. 27-8; emphasis supplied):

> "The appellant in this motion was not only asserting that at least eight of the twelve members of the grand jury indicated in this motion were prejudiced and disqualified, but was promising to prove it if given the opportunity; *yet, there is not the slightest indication in the long motion and offer of proof that an attempt has been made to interview a single one of the persons.* Under all the circumstances it is clear that the court acted properly in denying the motion for a hearing. In the absence of any reason for appellant not making his whole showing in the usual form of affidavits, it can be asserted on this review that the trial judge had exclusive discretion to deny a hearing. *The appellant was trying to get the court to make an investigation which the appellant should have made himself.*"

And on November 17, 1952 Judge Kirkland in *Weinberg* had adopted this position and had ruled that there was "nothing to prevent counsel, if he sees fit, contacting those 15 members and inquiring only of one subject, whether or not they had any personal bias toward * * * (defendant) and on that account, did they return the indictment" (R. 14). At the time Judge Kirkland had made this ruling, the *Weinberg* grand jury had not been discharged; at the time that petitioner sent his letter and questionnaire, the *Gold* grand jury had not been discharged.

After petitioner sent the letter and questionnaire he learned that District Judge Pine had questioned the propriety of his doing so. He thereupon made a full report of the matter to Judge Pine (R. 18-22) and later submitted the letter and questionnaire to the Court in support of a motion for a hearing in the *Gold* case (R. 22-23).

Nearly eight months later the government instituted this proceeding. At no time did the government contest petitioner's sworn statement (R. 11) that he had relied in good faith on the foregoing direct precedent, on the suggestion contained in the government's brief in *Emspak*, on the ruling of Judge Kirkland and on the acquiescence of Judge Holtzoff and of the United States attorney in the *Weinberg* case. And in its memorandum to the District Court, the government conceded that there was no intent by petitioner to influence the grand jury and that no such obstruction of justice occurred.[2] Nor did the government dispute that petitioner had no evil intent.

---

[2] The government's memorandum to the District Court said (at p. 8):

> "Mr. Cammer disclaims any effort to influence the grand jury. The Government does not charge such an obstruction of justice."

And at page 18:

> "Here it is not charged that Mr. Cammer's conduct amounts to an obstruction of justice in that it amounts to influencing a grand juror under Title 18 § 1503 U. S. C."

In its opinion the District Court stated that "it is not without doubt on the record before the Court, as to whether respondent's acts were committed in conscious wrong." The Court added: "There seems to be reason to believe respondent may have misconceived the proprieties. What he did was open. There was no opprobrious personal approach to jurors. There is indication respondent may have believed he had a right to propound the questions at the time he did, notwithstanding this Court is of opinion he had not" (R. 26).

Nevertheless, the District Court found the petitioner guilty but concluded that "under these circumstances, in the absence of a positive declaration by the Court, it may be unjust to severely punish respondent as otherwise would be required." It thereupon imposed a fine of $100.

The Court of Appeals affirmed, Judge Fahy dissenting. That Court made no mention of the fact that petitioner had followed precedent and the course of action suggested by the government in *Emspak*. It merely made the obscure observation that "appellant set up certain defenses which will not be detailed" (R. 28), and never discussed the validity of those defenses. It held that "it is immaterial whether Cammer was motivated by an evil purpose or not," but, it added, "were we pressed on the point we could readily find that he was" (R. 39). The Court below did not indicate how such a finding could have been made in the face of a record which demonstrated, as the government conceded, the opposite.

Summary of Argument

1. The sending of the questionnaire was not misbehavior; it was a proper preliminary to the motion for a hearing in the *Gold* case.

As defense counsel in a criminal case petitioner had the right to undertake to prove bias of the jurors, whether grand or petit. This included the right to undertake to prove that the effect of the loyalty program impaired the ability of government employees to act without fear in a case involving charges of communism.

Under applicable rulings of this Court, petitioner was required to make a prima facie showing of facts to indicate the existence of bias in the particular case beyond the mere fact of government employment. His actions were necessary and appropriate to that end, particularly in view of the government's successful insistence before the Court of Appeals and the District Court just prior to this case, that a defendant could not apply for a hearing on this issue unless he had himself first "contacted" or "interviewed" the grand jurors to elicit prima facie the existence of such fear or bias.

An attorney's right and duty to engage in such preparation is not affected by a distinction as to whether the grand jury which returned the indictment has been discharged, or is still in session; nor has such a distinction heretofore been indicated. Such a distinction would deprive a defendant of a constitutional right by fortuity if the grand jury were still sitting. Moreover, it would be contrary to precedent. When a grand jury has returned an indictment it is *functus officio* in the particular case even though it may continue to sit as to other cases.

Therefore, where, as here, it is conceded that there was no attempt to influence the grand jury; petitioner's conduct

was not misbehavior, but proper preparation in the discharge of his duty as counsel.

Even if petitioner had no right to send the questionnaire in his obligations to his client, nevertheless he cannot be held guilty of criminal contempt when all he did was to follow in good faith precedent in the same jurisdiction and suggestions made by the government itself.

2. An intent to obstruct justice is an essential and indispensable ingredient of criminal contempt. Such intent must be shown beyond a reasonable doubt. Here the government conceded the absence of such an intent and the District Court did not, and could not, find it. Petitioner should therefore have been acquitted.

3. Petitioner's conduct did not involve an "official transaction" within the meaning of the contempt statute as construed in *Matter of Michael*, 326 U. S. 224, at 228; *Nye* v. *United States*, 313 U. S. 33; *Schmidt* v. *United States*, 124 F. 2d 177 (6th Cir., 1941).

ARGUMENT

I. The mailing of the questionnaire was not misbehavior.

A. The questionnaire was a proper preliminary to the motion for a hearing; in any event petitioner had every reason to believe so.

1. It is always open to a defendant in a criminal case to undertake to prove the existence of bias among the jurors, whether grand or petit. Rule 6(b)(2), Federal Rules of Criminal Procedure. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States*, 339 U. S. 162, 171-2 (1950). "The law permits full inquiry as to actual bias * * *" *United States* v. *Wood*, 299 U. S. 123, 150

(1936). And "for the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *Id.*, at 146.

This Court has further held that the application of these principles requires that, in cases involving charges of communism, interrogation concerning the influence of the loyalty and security programs upon the ability of government employees to act as jurors impartially and without fear is a matter of right, and denial of this opportunity is reversible error. *Morford* v. *United States*, 339 U. S. 258 (1950).

The decision below effectively vitiates, at least in the District of Columbia Circuit, the promise of this Court that "the way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact." *Dennis* v. *United States*, 339 U. S. 162, at 164. See also *Frazier* v. *United States*, 335 U. S. 497 (1948). For, despite repeated efforts and impressive showings, no defendant has yet succeeded in obtaining a hearing on the issue of bias of government-employed grand jurors in the District of Columbia. This failure has been due to the government's successful contention that the defendant may not apply to the Court for a hearing to determine the existence of bias unless he has himself resorted first to self-help by "interviewing" or "contacting" the jurors to determine preliminarily whether bias exists beyond the fact of government employment.

Yet petitioner has been convicted of "misbehavior" because he did the very thing and pursued the only course which the government successfully insisted in *Emspak* and the District Court held in *Weinberg* was not only proper, but was required in order to meet the standards necessary to obtain a hearing.

Thus, if this conviction is sustained, Judge Kirkland's ruling, the acquiescence of the government and of Judge

Holtzoff to the similar questionnaire in *Weinberg*, and the government's brief in *Emspak* have served only as a trap to convict petitioner and to foreclose effectively the only way by which a defendant may, in the District of Columbia, meet the standards necessary to obtain a hearing as to the qualifications of government-employed grand jurors in such a case. If these rulings were to be changed they should not have been changed in a case where a lawyer did no more than to follow judicial rulings and a course urged by the government itself in previous cases as necessary and proper.

2. The criminal code is explicit in prohibiting any communication with a juror, grand or petit, to influence a pending matter. 18 U. S. C. § 1504. But this is not such a case. The government expressly disclaimed a contention that petitioner sought to influence the grand jury (*supra*, p. 7, n. 2) and, further, it has never been thought that inquiry into the legal qualifications of a juror is within this prohibited area.

Furthermore, there is here no issue concerning the propriety of the questions propounded. They were not calculated to and could not influence the deliberations of the jurors, nor did they advert to the merits of any matter under consideration. The District Court based its holding upon the timing of the questionnaire, not upon its content; it found that it did not constitute "an opprobious personal approach to jurors" and that opportunity would "unquestionably" have been afforded if application therefor had been made (R. 25-26). And despite the characterization by the majority below of the propounded questions as "harassing", they constituted no more than normal *voir dire*. *Dennis* v. *United States*, 339 U. S. 162, 170, note 4; *Morford* v. *United States*, *supra*. They were propounded without objection in *Weinberg*, and allowed and put on the *voir dire* of the petit jury in the *Gold* case itself (Trial Transcript, pp. 1a-101a).

Furthermore a contention that the questions were "harassing", apart from being contrary to the *Dennis* and *Morford* holdings, *supra*, would be self-defeating. If the fact of government employment did not affect the qualifications of the grand jurors, as the government would contend, questions concerning the effect of such employment were harmless. And if such employment affected their qualifications, the integrity of the administration of justice required disclosure of the fact. *Frazier* v. *United States*, *supra*; *Wood* v. *United States*, *supra*. Consequently no misbehavior was involved in either the fact or in the form and content of the questionnaire and accompanying letter.

3. The majority below emphasized the fact that on the very day when petitioner had caused the letter and questionnaire to be mailed (from his office in New York) he was appearing before the District Court in the District of Columbia in connection with another motion growing out of the *Gold* case and thus "cast aside an unusually convenient opportunity to consult with the judge about his contemplated action" (R. 34).

But petitioner's appearance on that day created no occasion, convenient or otherwise, to "consult" with the judge about preparatory steps which, under directly applicable rulings of the District Court, petitioner was required to take before he could apply to the court for assistance. We are unaware of any practice which permits defense counsel to consult with or to seek the advice of a judge about such preparatory steps in a pending case. Petitioner had acted responsibly and carefully, by thorough and painstaking research of the decisions, briefs and records in directly applicable cases in the files and library of the court and by consultation with attorneys familiar with the practice in the district who had had similar problems (R. 10-11). Under the existing rulings, which the courts below ignored, petitioner was then in no position to make an application to the court since he had not himself yet

made the necessary "investigation" or "contact" to determine whether the basis for an application to the court existed.

This reliance on the failure to consult because it was "convenient" to do so is misplaced for another reason. If the consent of the court was required, it would have been immaterial that it would have been inconvenient to obtain it. And if the consent of the court was not required, the fact that it could conveniently have been obtained was likewise immaterial. Convenience had nothing to do with the matter since the government's position and the rulings in *Emspak* and *Weinberg* made it inappropriate for petitioner to consult with or to seek a ruling from the court, convenient or not, until his own investigation had been completed. This position and these decisions should not have been suddenly reversed in the context of a conviction for criminal contempt of an attorney who performed a professional obligation in good faith, with proper motive, and in reliance upon recent and exact precedents the validity of which had not theretofore been questioned. If "consultation" with the trial court was a prerequisite to the inquiry, petitioner had no way of suspecting that fact. No one had made a point of it before and the government's brief in *Emspak* had not referred to the necessity for such a preliminary. The belated application of the principle resulted in entrapping petitioner.

B. It is immaterial that the grand jury had not been discharged at the time that the questionnaire was sent.

The courts below emphasized the fact that the grand jury had not been discharged when the questionnaire was sent (R. 26, 34-5). But in *Weinberg*, upon which petitioner based his actions, the grand jury had not been discharged at the time when Judge Kirkland upheld the government's contention that the defendant had to resort to self-help before applying to the court, and had ruled that there "is

nothing to prevent" defense counsel from "contacting" the grand jurors to inquire as to the existence of bias. The *Hoxsey* grand jury was discharged several months after this ruling was made.

Moreover, this case does not arise under 18 U. S. C. 1504 which forbids an attempt by writing to influence a grand or petit juror in any "pending" matter. Interrogation of a juror to determine his qualifications is not within that section and the government admits that petitioner has not done anything to bring him within it.

Furthermore a challenge to the qualifications of a grand juror must be presented while the matter or issue is still pending; otherwise it is too late. *Cf. Michel* v. *Louisiana* (No. 32) and *Porter et ux.* v. *Louisiana* (No. 26), ——— U. S. ———, December 5, 1955, Oct. Term, 1955. Rule 6(b)(1) of the Federal Rules of Criminal Procedure provides for a challenge before the oath is administered; Rule 6(b)(2) provides for such a challenge after an indictment has been returned; and there is no doubt but that such a challenge may, and, if the facts justifying it are known, must be made while the grand jury is sitting and before it has returned the indictment. *Crowley* v. *United States*, 194 U. S. 461, 469-73 (1904); *United States* v. *Herzig*, 26 F. 2d 487 (D. C., S. D. N. Y. 1928). See *United States* v. *Gale*, 109 U. S. 65 (1883) and annotation at 27 L. ed. 857. Indeed, it is settled that such a challenge must be made *in limine*. *United States* v. *Gale*, *supra*; *Burchett* v. *United States*, 134 F. 2d 821 (4th Cir., 1912); *Wright* v. *United States*, 165 F. 2d 405 (8th Cir., 1918); *Redmon* v. *Squier*, 162 F. 2d 195 (9th Cir., 1947).

Since questions designed only to probe the existence of bias are entirely proper (*cf. Duke* v. *United States*, 90 F. 2d 840 (4th Cir., 1937)), it must follow that the fact that the grand jury is still sitting can have no effect upon the defendant's right to explore the facts. Otherwise a defend-

an indicted towards the end of a grand jury term would have the right to explore for the purpose of adducing facts in support of his challenge while another defendant, fortuitously indicted early in the term, would be denied this right because the grand jury had not been discharged. Since grand juries may sit for eighteen months, the right to present a challenge would in such a case be effectively nullified. For on the one hand the government has successfully contended in the District of Columbia circuit that the defendant is first obliged himself to interview or contact the jurors to determine whether a basis for the challenge exists, and on the other the defendant is faced with the necessity of filing the challenge before arraignment.[3]

Nor can the test turn on the speculation in the defendant's mind as to whether the grand jury, having returned an indictment, is through with him or may still be considering the possibility of further indictments. To allow the right to explore in the one case but not in the other, particularly in view of the required secrecy of grand jury proceedings, is too tenuous and subjective a test to be considered. Moreover, the prosecutor could thereby always effectively preclude a lawful inquiry by hinting at the possibility either of additional or of superseding indictments.

Thus the asserted distinction has no basis in reason. Moreover, as noted, it is contra to the direct precedent in *Vinberg* and no suggestion that such a distinction is significant can be discerned from the unqualified position

[3] In the District of Columbia, by local court rules, the challenge to the grand jury may be made within ten days after arraignment or within such additional period as the Court may grant for motions. In the *Gold* case the trial court granted counsel thirty days to file motions. This time was subsequently extended. If the motion had not been filed within the time allotted by the Court, it would have been too late. The deadline for filing expired while the grand jury was still in session.

taken by the government in *Kinsella* that counsel was not entitled to seek assistance from the Court unless counsel first, by their own efforts, established a likelihood of bias by interrogating the grand jurors.

Finally the letter in issue was confined only to the matter concerning which the grand jury had returned the indictment. It was not concerned with, and did not refer to, any other matter which the grand jury might have had under consideration. As to the matter in which an indictment had been returned, the function of the grand jury was exhausted as though it had been discharged, and even though sitting it had no further concern with or interest in it. See *In re Oliver*, 333 U. S. 257, at 265 (1948). See also *In re National Window Glass Workers*, 287 Fed. 219 (1922); *Norcross v. United States*, 203 Fed. 13 (9th Cir., 1913).

Finally, it is true as to this point as well as on the suggestion of prior "consultation" with the trial judge that if the questioning was permissible only if the grand jury had been discharged, petitioner had no way of knowing of this distinction, which had not been articulated in the precedents on which petitioner had relied.

II. Petitioner was not guilty of criminal contempt since there was here wholly absent, and the District Court did not find, an intent to obstruct justice or an obstruction of justice.

In view of the petitioner's uncontradicted denials, the government's concession, and the District Court's failure to find, that an obstruction of justice occurred or was intended, or that there was any effort to influence the grand jury, appellant should have been acquitted without regard to whether the questionnaire was proper or his conduct "misbehavior".

The underlying premise of any contempt proceeding is an obstruction of justice and this essential element "must clearly be shown in every case where the power to punish for contempt is exerted." *Matter of Michael*, 326 U. S. 224, at 228 (1945), citing *Ex parte Hudgings*, 249 U. S. 378 (1919). Further criminal intent is a material and essential ingredient of the crime of criminal contempt. *Indianapolis Water Co. v. American Strawboard Co.*, 75 F. 972 (C. D. Ind. 1896); *United States v. Univis Lens Co.*, 88 F. Supp. 809 (D. C. S. D. N. Y. 1950). Such intent must be established beyond a reasonable doubt. As to the necessity of proof beyond a reasonable doubt of every essential ingredient of the offense, and the evidentiary force to be given to the presumption of innocence in such a case, see also *Blim v. United States*, 68 F. 2d 484, at 487 (7th Cir., 1934), citing *Jones v. United States*, 209 F. 585, 587 (7th Cir., 1913); *In re Michael*, 146 F. 2d 627, 628, footnote 2 (3d Cir.) reversed on other grounds, 326 U. S. 224.

> "Guilt in a criminal contempt must be established beyond a reasonable doubt. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 S. Ct. 492, 55 L. ed. 797, 34 L. R. A., N. S. 874. Once established the penalty of such a judgment against an attorney is long-lived.
>
> "It does not cease with the payment of the fine or with the discharge of a jail-sentence, but, being inherent in the judgment, may arise to confront him throughout his professional career." *Schmidt v. United States*, 115 F. 2d 394, at 398 (6th Cir., 1940); see same case also at 124 F. 2d 177 (6th Cir., 1941).

Yet here the District Court expressly found that it was in doubt as to an essential element of the offense.

No basis for a finding of criminal intent exists in this case. Nor was it or could it be suggested that appellant

acted defiantly or out of a spirit of resistance, or even negligently or indifferently to his duty as an officer of the Court. *Cf. United States v. Ford*, 9 F. 2d 990 (D. C. Mont. 1925). On the contrary, his actions were consistent with the highest standards of professional care; they were based on convincing authority in this Court (*Frazier*, *Wood*, *Dennis* and *Morford*), as well as in the District Court, on study of the briefs and records in *Emspak* and *Weinberg*, and on consultation with other attorneys who had worked in the field (R. 10).[4]

Apart from the conclusory allegation in the moving petition that petitioner's conduct was in violation of 18 U. S. C. 401(2), no order, decision, statute or rule of practice was referred to by the government or by the courts below to diminish the force of the rulings discussed in Point I, nor to explain the inconsistency of the government's position in its brief in *Emspak* and its argument before Judge Kirkland on the one hand and the position advanced by it in this proceeding on the other. Indeed the District Court referred to the "absence of a positive declaration by the Court" to offset the effect of this body of law.

If lawyers may not act on the authority of a line of cases in this Court consistently and steadfastly adhered

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[4] It is appropriate to observe that at the conclusion of the *Gold* case, Judge McLaughlin who had presided at the trial, commented on the high professional standards observed and the care and thoroughness with which defense counsel had conducted the defense as follows (Gold transcript for April 27, 1954, p. 70):

> "This case consumed, as counsel knows a period of six weeks in trial. It was a very vigorously contested case, one in which counsel on both sides expertly represented their respective clients. And the Court is not aware of another case in which the Court has participated in which every conceivable question was more carefully raised, and rulings thereon more carefully preserved in the record. The Court can do no less than commend counsel for their zeal in their representation of their respective clients."

to, upon the government's own interpretation of the action required under those cases, upon District Court rulings based thereon, and upon the practice of members of the bar consistent therewith, except under peril of a conviction for contempt upon a sudden reversal of the authorities in the contempt proceeding itself, how can they act at all? The observation of Mr. Chief Justice Fuller in *Matter of Watts*, 190 U. S. 1, at 35 (1903) that "the fearless discharge of their duty by [the gentlemen of the bar] should not be shaken by liability to punishment for mere errors of judgment in rendering such assistance" is especially appropriate in the context of this case.

There was no criminal intent in this case; thus even if the questionnaire were improper, no conviction for contempt was justified in view of the District Court's express finding of a reasonable doubt as to the existence of such an intent.

The conviction of petitioner under the circumstances can only serve to intimidate the bar in the exercise of its function to defend accused persons zealously. It is particularly unfortunate in this regard that petitioner's conviction occurred as a result of his representation of a person accused of being a Communist. Surely the bar can infer, not without reason in view of the District Court's opinion [5] and the readiness of the court below to find an evil motivation "if pressed" (R. 39) that this case proves the danger to attorneys of representing unpopular defendants.

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[5] Nothing has changed its understanding that whenever a case is pending before judge or jury, no pressure or harassment of any character should be exercised on one who must make a decision. Unfortunately within late years there has been a tendency to bring such pressures and harassment. For a time, there was picketing of courts during trials. Then there came about unseemly conduct of counsel in court, requiring disciplining of counsel. Now it appears searching questionnaires have been submitted to grand jurors while they are

III. In any event, petitioner's conduct did not involve an "official transaction" within the meaning of the contempt statute.

Assuming *arguendo* that petitioner's conduct was "misbehavior", and that an intent to obstruct justice was established beyond a reasonable doubt, the test of an "official transaction" adopted by the majority below was erroneous.

The majority below, on the authority of *Ex parte Bradley*, 7 Wall at 374 (1868) made the test of "official transaction" turn on whether the "actions occurred when he was directly engaged 'in the practice of the profession'." This vague test, extracted from a case where an attorney assaulted a judge in the courtroom, is erroneous, as Judge Fahy points out in his dissent, because it conflicts with the narrow meaning which this Court has accorded to that phrase in *In re Michael*, 326 U. S. 224, at 229, and to the holdings of the First and Sixth Circuits in *Farese* v. *United States*, 209 F. 2d 312, at 315 (1st Cir., 1954), and *Schmidt* v. *United States*, 124 F. 2d 394 (6th Cir., 1941).

Furthermore, the emphasis by the majority upon *Sinclair* v. *United States*, 279 U. S. 749 (1929); *Ex parte Bradley, supra*, and *Tanner* v. *United States*, 62 F. 2d 601 (10th Cir., 1933) implies vitality in a series of cases bottomed on the "reasonable tendency" rule expressed in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (1918). But the "reasonable tendency" rule was firmly overruled by *Nye* v. *United States*, 313 U. S. 33 (1941), where this Court held that the contempt statute was intended as "a drastic delimitation" upon the power of the courts to punish for crime without indictment or the right to trial by jury. *Ibid.*, at 45-46. "It is not sufficient that the misbehavior charged has some direct relation to the work of the court * * * In view of the history of these provisions, meticulous regard for these separate categories of offenses must be had so that the instances where there is no right

to jury trial will be narrowly restricted." *Ibid.*, at 49. See also *Ex parte Terry*, 128 U. S. 289 (1888); *Cooke* v. *United States*, 267 U. S. 517 (1925). Since *Nye* this Court has consistently reaffirmed the view that the contempt statute is to be construed most narrowly. *In re Michael*, 326 U. S. 224, 227 (1945). See also *In re Oliver*, 333 U. S. 257, 274-5 (1948); *Craig* v. *Harney*, 331 U. S. 367, 372 (1947); *Pennekamp* v *Florida*, 328 U. S. 331, 334 (1946); *Bridges* v. *California*, 314 U. S. 252, 261 (1941).

Thus, *Sinclair*, although entirely distinguishable on the facts, expressly rested on the *Toledo* rule which *Nye* overruled. The dicta in *Ex parte Bradley* is of questionable validity in the light of *Nye*; and *Tanner*, where an attorney, in the courthouse berated a juror because he had rendered an inadequate verdict, was decided eight years before *Nye*. *Cf. In re Michael*, 326 U. S. 224 (an attorney-trustee in bankruptcy testifying falsely before the grand jury concerning the bankrupt estate is not engaged in an "official transaction"); *Farese* v. *United States*, 209 F. 2d 312 (1st Cir., 1954) (an attorney who in a courthouse corridor tried to corrupt a witness in a case on trial was not engaged in an "official transaction.") and *Schmidt* v. *United States*, 124 F. 2d 177 (6th Cir., 1941), see also same case at 115 F. 2d 394 (1940).

The effect of *Nye* is decisively illustrated by the two decisions in *Schmidt*, *supra*. There the defendant was an attorney in a mail fraud case. With knowledge that the grand jury had not been discharged, and in disregard of the oath of secrecy of the grand jurors, he had his client induce some of the grand jurors to disclose the proceedings and deliberations of the grand jury which had resulted in the indictment and to make affidavits respecting these matters. He then filed the affidavits in support of a motion to quash the indictment. He was convicted of contempt "for filing these affidavits contrary to and in violation of the oath of said grand jurors, without application to or per-

mission from the Court at the time when the grand jurors were subject to recall and had not been discharged." The Sixth Circuit, although it held that his conduct constituted contempt, reversed the conviction for an irregularity in the proceedings. 115 F. 2d 394. He was again convicted. In the interim *Nye* was decided. The Sixth Circuit again reversed, but this time on the ground that the conduct involved was not in an "official transaction" with the Court, nor did it occur within the Court's presence or so near thereto as to fall within the statute. 124 F. 2d at 177.[6]

Cases involving corrupt or improper dealing with the Court itself, such as the presentation of documents known to be forged (*United States* v. *Ford*, 9 F. 2d 990 [D. C. Mont. 1925]; *In re Steiner*, 195 Fed. 299 [D. C. S. D. N. Y. 1912]) or presenting a false answer with knowledge of its falsity (*United States* v. *Frank*, 53 F. 2d 128 [D. C. N. J. 1931]); or disrespect towards or misconduct in the presence of the Court (*United States* v. *Landes*, 97 F. 2d 378 [2d Cir., 1938]; *Cooke* v. *United States*, *supra*), and the like, are clearly distinguishable. They involve subdivisions (1) and (3) of Section 401 or are direct misconduct vis-a-vis the Court. This distinction is made plain in *Matter of Michajl*, 326 U. S. 224. Therefore the proceeding should have been dismissed for the separate reason that petitioner's conduct was not in an "official transaction" within the meaning of the statute.

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[6] The Court below erroneously read *Schmidt* as "primarily" concerned with the first rather than the second subsection of 18 U. S. C. § 401 (R. 53). Examination of the decision will disclose that the Court placed no emphasis on the first subsection over the second.

Conclusion

The conviction was unwarranted. Petitioner's conduct was not improper. No contempt was intended or committed. In any case, his conduct was not within the meaning of the statute. The conviction of petitioner is a manifest injustice, endangers the right of proper representation, and compromises the administration of justice. The judgment appealed from should therefore be reversed with direction to the District Court to dismiss the proceeding below.

December, 1955.

Respectfully submitted,

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Office - Supreme Court, U. S.
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No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1955

HAROLD I. CAMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District Court is reported in 122 F. Supp. 388. The opinion of the Court of Appeals (Pet. 18-34) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 17) was entered on May 5, 1955. The petition for a writ of certiorari was filed on May 31, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was "misbehavior" in violation of 18 U.S.C. 401(2) for a defendant's attorney, without permission from the court, to submit to Government employee members of a grand jury, prior to its discharge, a questionnaire for possible use in connection with a motion for dismissal of an indictment the grand jury had returned against the attorney's client.

2. Whether such action was in an "official transaction" within 18 U.S.C. 401(2).

3. Whether the court's statement, in imposing merely a $100 fine, that it had doubts that the acts were consciously wrong, was inconsistent with the adjudication of contempt.

STATUTE INVOLVED

18 U.S.C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * * *
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> * * * * * * *

STATEMENT

Petitioner was attorney of record for one Ben Gold, who had been charged with filing a false non-communist affidavit in violation of 18 U.S.C. 1001 in an indictment returned August 28, 1953, by the May 1953 Grand Jury of the District Court for the

District of Columbia (R. 1). He was also attorney of record for Vera Taft, secretary to Ben Gold, and Pietro Lucchi, an associate of Ben Gold, both of whom had been served with subpoenas duces tecum by the same grand jury (R. 1-2). During the hearing on the motion to quash the subpoenas, held September 22, 1953, before District Judge Pine, government counsel advised the court in the presence and hearing of petitioner that the grand jury was continuing its investigation of other possible violations of 18 U.S.C. 1001.

On September 22, 1953, petitioner, in his capacity as attorney for Ben Gold, sent to the federal employees on the grand jury letters requesting them to answer and return an attached questionnaire (R. 4-5). Each letter stated that in "in the interest of the fair administration of criminal justice" the return of the questionnaire was sought "to learn the effect of the loyalty program on jurors from the Federal Government." The letter stated that it was the duty of the juror "as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case." (R. 4.) The questionnaire asked each juror such questions as whether he thought a government employee would "get into trouble" for defense of a fellow employee accused of disloyalty, for failure to drop accused acquaintances, or for reading controversial literature. It sought to discover whether the government employee was involved in a loyalty proceeding and asked whether he thought a government employee would be in difficulty by reason

of a vote to acquit or not indict a person publicized as a communist (R. 5-6). When the letters and questionnaires were brought to the attention of District Judge Pine by members of the grand jury who had received them, they were ordered impounded (R. 3).

On May 10, 1954, after completion of the trial of Gold, petitioner was directed to show cause why he should not be adjudged guilty of contempt for sending the letters and questionnaires (R. 1-8). In his answer petitioner alleged that his purpose in sending the questionnaires was to discover whether there was a basis for challenging for bias the government employee grand jurors; that decisions in prior cases had indicated that, to support such a challenge, more was needed than the mere fact of government employment; and that he was relying upon what had actually been done in the case of *United States* v. *Weinberg*, (D.D.C., Crim. No. 829-52) when he sent the questionnaire (R. 8-29).

The District Judge found petitioner in contempt (R. 32-33), stating:

> There is a decided difference between questioning jurors after they have concluded their services and questioning jurors when they are actively hearing or considering a case. To harrass them by challenging and lengthy questions while they are deliberating or about to consider cases is intolerable. * * * Jurors will not serve competently if so harassed.

With respect to the argument that the court in the trial of Gold had allowed only thirty days for

motions challenging the grand jury, the court pointed out that, had there been a suggestion of need to investigate bias and a showing of good faith, the court "unquestionably would have postponed the time for filing motions until all indictments were filed and opportunity to ascertain the status of jurors had been afforded." (R. 32.) The District Court added, however (R. 33):

> While the Court finds there is no question as to the impropriety of what respondent has done, it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong.

For this reason, the court imposed merely a fine of $100 (R. 33).

On appeal, the judgment was affirmed (Pet. 17-32), Judge Fahy dissenting on the ground that petitioner's conduct, assumed to be misbehavior, was not "in an official transaction as an officer of the court" (Pet. 32-34).

ARGUMENT

1. In arguing that his conduct did not constitute misbehavior (Pet. 9-11), petitioner ignores the central point on which the finding of contempt rests, *i.e.*, that he approached a still active grand jury as to matters which could have a bearing on their action as grand jurors, without disclosure to or consent of the court. Both the District Court and the Court of Appeals found it unnecessary to consider the broader issues petitioner seeks to inject in the case—whether a grand jury can properly be challenged for bias or whether, if such challenge can

be made, it would justify the type of questions which were asked here. The basis of the holdings below is simply that, even assuming that under some circumstances an attorney may question grand jurors, petitioner had no right to interrogate an active grand jury without permission from the court.

As the District Court pointed out (R. 32-33), there is a vast difference between an approach to grand jurors who have completed their work and the approach in this case to grand jurors who were known to be still considering the type of case to which the questionnaire related. Petitioner argues (Pet. 11) that he could not wait until the grand jury was discharged because of the time-limit on his pretrial motions in the Gold case. But, as the District Court noted, petitioner made no showing that he had presented his dilemma to the trial court. Nor did he tell Judge Pine, who heard his motion to quash subpoenas as to matters pending before the grand jury, that he found it necessary to question the grand jurors concerning their reaction to the loyalty program. The alleged necessity for prompt action certainly does not excuse the failure to seek permission from the court before approaching the grand jury, which was not only technically in session but actually deliberating on the type of case to which the questionnaire related.

Thus, on the issue of misbehavior the narrow question is whether an attorney can be held to knowledge that he should obtain permission from the court before questioning members of an active

grand jury as to their state of mind with respect to issues which bear on the matters before them. On this question, there was no dissent in the court below. We think there can be no doubt that an attorney can properly be held to such knowledge. As this Court said in *Remmey* v. *United States*, 347 U.S. 227, 229, any private communication with a jury is presumptively prejudicial. See also *Sinclair* v. *United States*, 279 U.S. 749, 765; *Rakes* v. *United States*, 169 F. 2d 739, 745 (C.A. 4).

2. We submit that the court below was also correct in holding that petitioner was engaged in an "official transaction" when he sent his letter and questionnaire to the grand jurors. The letter itself announced in its caption that it related directly to the case of Gold, and made explicit the obvious fact that it concerned petitioner as counsel and the grand jury as accuser in this matter of official court business (R. 4). Written in his capacity as "counsel for the defendant," an officer of the court, petitioner's letter had no purpose and no meaning except as it bore precisely on the official business of Gold's indictment. The holding that such action was part of petitioner's "official transactions" as an attorney in the Gold case rests upon the plain and literal meaning of that phrase in 18 U.S.C. 401.

As the court below observed (Pet. 23-24), considerations as to what constitutes contempt "so near" the court "as to obstruct the administration of justice" are significant under subsection (1) of 18 U.S.C. 401, but are irrelevant to this case under

subsection (2). The latter provision, governing generally the conduct of the court's "officers in their official transactions", forbids "misbehavior" regardless of its geographical location. Like subsection (3), punishing disobedience of court orders without limitation as to the place where such disobedience occurs, subsection (2) supports with the power of punishment the court's essential right to insist that its officers in their official transactions behave with propriety at all times and in all places. Thus, the only issues are whether there was (1) misbehavior, (2) by an officer of the court, (3) in an official transaction. All three elements were present here.

3. The court's statement, in imposing merely a fine of $100, that it had doubts as to whether petitioner's acts were "consciously wrong" is not inconsistent with the adjudication of contempt. There is no doubt that petitioner's acts were consciously and willfully done. Evil motive is not an element of the offense. *Kelly* v. *United States*, 250 Fed. 947, 950 (C.A. 9); *Townsend* v. *United States*, 95 F. 2d 352 (C.A. D.C.); *Fields* v. *United States*, 164 F. 2d 97 (C.A. D.C.).

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 110

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 110

HAROLD I. CAMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 27–39), together with a dissenting opinion (R. 39–41), is reported at 223 F. 2d 322. The opinion of the District Court (R. 25–26) is reported in 122 F. Supp. 388.

JURISDICTION

The judgment of the Court of Appeals was entered May 5, 1955 (R. 42). The petition for a writ of certiorari was filed on May 31, 1955, and was granted on October 10, 1955 (R. 42). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner was counsel of record for a client who had been indicted for filing a false non-communist affidavit under the Taft-Hartley Act. Thirteen members of the grand jury which had returned the indictment were federal employees. Petitioner, without notifying the court or seeking its permission, directed a letter and a searching questionnaire to the federal employee jurors, although the grand jury was still sitting and, to petitioner's knowledge, was actively continuing its investigation of possible similar violations. The questionnaire related to the effect on the jurors of the government's loyalty program and was for possible use in connection with a motion to dismiss the indictment.

The questions presented are:

1. Whether petitioner's conduct in communicating with members of a sitting grand jury, without first notifying the court or receiving its permission, constituted "misbehavior" within the meaning of 18 U. S. C. 401 (2).

2. Whether petitioner can avoid liability for contempt of court for knowing and willful improper conduct, on the ground that he did not intend "conscious wrong".

3. Whether petitioner, in communicating with the grand jurors on behalf of an indicted client, was an "officer of the court" engaged in an "official transaction" within the meaning of 18 U. S. C. 401 (2).

STATUTE INVOLVED

18 U. S. C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * *
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> * * * * *

STATEMENT

On June 15, 1954, petitioner was adjudged guilty of contempt of court by the United States District Court for the District of Columbia for misbehavior in an official transaction as an officer of the court, in violation of 18 U. S. C. 401 (2) (R. 24–25). For this contempt he was sentenced to pay a fine of one hundred dollars (R. 25, 26). On appeal, the conviction was affirmed (R. 27–39, 42), with one judge dissenting (R. 39–41).

1. *The facts* are not in dispute and may be summarized as follows:

On August 28, 1953, the May 1953 grand jury for the District of Columbia indicted one Ben Gold for filing a false non-communist affidavit in violation of 18 U. S. C. 1001 (R. 1, 7). On August 31, 1953, petitioner, a member of the New York Bar, entered an appearance *pro hac vice* on behalf of Gold (R. 1, 7, 8). Petitioner was also attorney of record for Vera Taft, secretary to

Ben Gold, and Pietro Lucchi, an associate of Ben Gold, both of whom had been served, prior to September 22, 1953, with subpoenas duces tecum by the same grand jury (R. 1, 7).

On September 22, 1953, petitioner, in his capacity as attorney for Ben Gold (R. 3), knowing that the May 1953 grand jury had not been discharged and had subpoenaed his clients Taft and Lucchi (R. 2, 7), sent to its thirteen federal employee members letters requesting them to answer and return an enclosed questionnaire (R. 2, 3–6, 7, 8, 11). Each letter stated that "in the interest of the fair administration of criminal justice" the return of the questionnaire was sought "to learn the effect of the loyalty program on jurors from the Federal Government" (R. 3, 7). The letter also stated that it was the duty of the juror "as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case" (R. 4, 7).

The questionnaire asked each juror eighteen questions of the tenor of the following three (R. 4–5):

> Do you think that it is wise or safe for a government employee to express views on a controversial question different from the position of the Government?
>
> * * * * *
>
> On the whole do you think that it was advisable, in the past six years, in view of the loyalty program, for government employees to take certain precautions, such

as: (a) avoiding an acquaintance; (b) giving up a friendship; (c) resigning from an organization; (d) declining to join or make a contribution to an organization; (e) keeping his views on controversial questions to himself and close friends; (f) declining to help a government employee in a loyalty proceedings, although he knows of nothing against him; (g) avoiding books, magazines and music that might be left-wing in nature or authorship; or (h) advising another fellow employee to do any of the foregoing? Please indicate whether any or all of these would be wise precautions, if so, why?

* * * * *

Do you think that * * * a vote [not to indict a publicized communist] might affect [a government employee's] employment status, in any way, such as possible promotions, assignments, or selection for layoff in the current reductions in force? If so, how?

The jurors were likewise asked whether they thought that a government employee "might get into trouble" for defense of a fellow employee accused of disloyalty, or for failure to drop accused acquaintances, or for reading controversial literature (R. 4–5). The questionnaire also sought to discover whether the government employee was involved in a loyalty proceeding and asked whether the juror thought that a government employee might get into difficulty in a

future loyalty proceeding by reason of a vote to acquit or not to indict a person publicized as a communist (R. 5–6). Petitioner has conceded (R. 7) that he had sent these letters and questionnaires to the grand jurors with knowledge that the grand jury was continuing its investigation of possible similar violations and "without the permission, consent, authorization, or knowledge" of the court (R. 2, 7).

On the same day that petitioner dispatched the letters and questionnaires, he appeared before the District Court to argue motions to quash and vacate the subpoenas issued to his clients Taft and Lucchi, and succeeded in having their appearances in response to the subpoenas deferred (R. 1–2, 7).

On September 24, 1953, the letters and questionnaires were ordered impounded when they were brought to the attention of District Judge Pine by members of the grand jury (R. 2, 18–19). On October 2, 1953, petitioner submitted a statement as to the circumstances under which the letters and questionnaires had been sent, and disclaimed any intention of influencing the grand jury (R. 18–22).

2. *The contempt proceedings.*—On May 10, 1954, after Gold's trial had been completed, petitioner was directed to show cause why he should not be adjudged guilty of contempt for sending the letters and questionnaires to the federal employee members of the grand jury without the

permission or knowledge of the District Court (R. 6–7). The order to show cause was issued on an application made by the United States Attorney (R. 1–6), who had been appointed and directed by the court to investigate the matter (R. 6). Petitioner filed a reply which (a) admitted all the factual allegations set forth in the application (R. 7), (b) denied that these admitted facts constituted misbehavior or contempt, and (c) further alleged that his purpose in sending the questionnaires had been to discover whether there was a basis for challenging for bias the government employee grand jurors; that decisions in prior cases had indicated that, to support such a challenge, more was needed than a mere showing of government employment; and that when he sent the letter and questionnaire he was relying upon the record of what had been done in *United States* v. *Weinberg* (D. D. C., Crim. No. 829–52) and upon a portion of the argument in the government's Court of Appeals brief in *Emspak* v. *United States*, 203 F. 2d 54 (C. A. D. C.) (R. 7–23).

The matter was heard without a jury before Chief Judge Laws, who found petitioner guilty of contempt (R. 24–26), and stated (R. 26):

> There is a decided difference between questioning jurors after they have concluded their services and questioning jurors when they are actively hearing or considering a case. To harass them by

> challenging and lengthy questions while they are deliberating or about to consider cases is intolerable. * * * Jurors will not serve competently if so harassed.

With respect to the argument that the court had allowed only thirty days for motions challenging the grand jury that had indicted Gold, the court pointed out that, had there been a suggestion of a need to investigate bias and a showing of good faith, the court "unquestionably would have postponed the time for filing motions until all indictments were filed and opportunity to ascertain the status of jurors had been afforded" (R. 25–26). Noting that it had "never occurred to [him that] a lawyer would not know the evil of such practices" (R. 25), Chief Judge Laws, however, added (R. 26):

> While the Court finds there is no question as to the impropriety of what respondent has done, it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong.

For this reason, the court imposed merely a fine of one hundred dollars (R. 25, 26).

On appeal, the judgment was affirmed (R. 27–39, 42). Judge Fahy dissented on the ground that petitioner's conduct, while assumed to be misbehavior by an officer of the court, was not "in an official transaction as an officer of the court". He stated that he did not think that

18 U. S. C. 401 (2) gave courts "the power by summary proceedings to police such professional behavior of a member of the bar" (R. 40).

SUMMARY OF ARGUMENT

Petitioner was properly adjudicated guilty of contempt for communicating with members of a still active grand jury, without first notifying the court or receiving its permission. The letter and questionnaire which petitioner, attorney of record for a client whom the grand jury had recently indicted, sent to the jurors was designed to probe their motives in indicting his client as regards possible personal bias toward reputed communists. Because this contempt prosecution is concerned with the impact of petitioner's conduct upon the grand jury system and is directed towards protecting from harassment the grand jury as an arm of the court, there is no occasion to reach the larger issue which petitioner has sought to inject into this case—whether an indictment can be challenged on the ground of personal bias of the grand jurors.

A. Petitioner's conduct constituted misbehavior. Without the knowledge or authorization of the court to which the grand jury was attached, petitioner sent to the federal employee jurors a searching questionnaire composed of challenging and lengthy questions, together with a letter which stated that it was the juror's "duty as a citizen to help enlighten the court" (R. 4) by preparing

and returning answers to the questionnaire. This action had a tendency to interfere with and harass the grand jury, which was still sitting and was, to petitioner's knowledge, actively investigating other possible offenses involving suspected communists.

Since the grand jury is an essential instrumentality of federal courts in the trial of criminal cases, its members, like the members of the judiciary, must be free in their deliberations from outside probing which would unduly add to the onus of their task. This case, therefore, can be decided, as it was in both lower courts, on the simple basis that an attorney can be properly held to know that he should obtain permission from the court before he can properly contact active grand jurors.

In view of the cases which have considered the inviolability of jurors from outside interference, it is not unreasonable to hold an attorney to knowledge that he should not approach them without first obtaining the court's permission. In *Remmer* v. *United States*, 347 U. S. 227, 229, this Court observed, with regard to a petit jury, that "[a] juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder". In *Sinclair* v. *United States*, 279 U. S. 749, the court upheld defendant's conviction for contempt for conduct which involved jury shadowing. Searching examinations of jurors following a trial was condemned in *Rakes* v.

United States, 169 F. 2d 739 (C. A. 4), certiorari denied, 335 U. S. 826.

Petitioner cannot justify his unauthorized approach to members of an active grand jury by reliance on the uncensured conduct of defense counsel in somewhat different circumstances in *United States* v. *Weinberg*, Criminal No. 829–52 (D. D. C.), and on a sentence taken from context in the government brief in *Emspak* v. *United States*, 203 F. 2d 54 (C. A. D. C.), which did not suggest that court permission was unnecessary.

The facts of this case show that petitioner could not have been unaware of the impact of his questionnaire upon the grand jury. He knew, as was evidenced by his appearance in court to quash subpoenas, that the grand jury was continuing its investigation of communist affiliations of labor union officials. He knew his questionnaire probed for personal bias of grand jurors toward alleged communists. He had ample time to ask the court's permission to mail the questionnaires, had he so desired. Petitioner's argument that the time limit on challenging the grand jurors forced him to proceed without court approval is specious since additional time would surely have been granted had petitioner asked for it in good faith. Moreover, there was nothing to prevent his notifying the court as soon as he undertook his project.

B. The element of intent requisite for contempt under 18 U. S. C. 401 (2) was proved by the gov-

ernment beyond a reasonable doubt. The proof showed that petitioner acted knowingly and willfully.

Petitioner's argument that he may not be found guilty of contempt in view of the trial court's expressed doubt that he acted "in conscious wrong", is not supported by the decisions on the point. In *Kelly* v. *United States*, 250 Fed. 947 (C. A. 9), certiorari denied *sub nom. Galen* v. *United States*, 248 U. S. 585, in which an attorney was charged with contempt for conversing with petit jurors with a view to influencing them, the court, citing cases, stated that it was not necessary in contempt to prove a wrongful motive but that it sufficed to show that defendant acted knowingly and willfully. Similarly, in contempt of Congress cases, the courts do not require proof of a specific intent or a showing of malice. *Townsend* v. *United States*, 95 F. 2d 352 (C. A. D. C.), certiorari denied, 303 U. S. 664; *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843, and *Fields* v. *United States*, 164 F. 2d 97 (C. A. D. C.), certiorari denied, 332 U. S. 851.

The true significance of the trial court's remark about petitioner's lack of conscious wrong, as gathered from the context in which it was used, shows that the court was considering malice or the lack thereof in assessing the penalty, not in determining guilt. Petitioner's reliance on the *bona fides* of his conduct serves only to negate any

influence of malice which may be inferred from his acts; it goes to mitigation of the sentence and not to establishing innocence.

C. Petitioner was acting as an "officer of the court" engaged "in an official transaction" when he transmitted his letter and the enclosed questionnaire to the federal employee members of the grand jury. As an attorney duly admitted to practice before the courts of New York State, and before the United States District Court for the District of Columbia, *pro hac vice*, he was an officer of the court. *Ex Parte Garland*, 4 Wall. 333. The grand jury, to which petitioner addressed his letters and questionnaires, was an arm of the court and part of the federal judicial machinery. *Savin, Petitioner*, 131 U. S. 267; *Clark* v. *United States*, 289 U. S. 1.

The letters and questionnaires were prepared by petitioner as an officer of the court and directed to the grand jury which was an arm of the court concerning a case then pending before the court. The letter not only referred to "U. S. v. Gold, U. S. District Court for the District of Columbia, Criminal No. 1344–53", but affirmatively recited that petitioner, as author, was writing in his official capacity as "counsel for the defendant" to the grand jurors in their official capacity. In addition, petitioner cloaked his conduct with a further vestige of official authority by writing of the juror's "duty as a citizen to help enlighten the court."

Though no case has been discovered which squarely passes on the meaning of the words "in an official transaction" in circumstances identical to those here present, the application of the phrase in other cases clearly demonstrates it is broad enough to cover this case. In *In re Paschal*, 10 Wall. 483, this Court pointed out that it was proper for courts to punish by contempt attorneys who misused or withheld funds received by them for their clients pursuant to a judgment of a court. Courts, by virtue of their contempt power, have authority to compel attorneys to behave themselves with propriety in such matters as pertain to the business of the court in all its ramifications. *United States* v. *Anonymous*, 21 Fed. 761 (C. C. W. D. Tenn.).

Since this contempt prosecution rests upon a charge of misbehavior of an officer of the court in an official transaction under subsection (2) of 18 U. S. C. 401, there is no need to be concerned with cases arising under subsection (1), which deals with "misbehavior of any person in [the] presence [of the court] or so near thereto as to obstruct the administration of justice".

This contempt proceeding involves vindication of the integrity of an active grand jury and protecting it from interference and harassment by attorneys who approach its members without court approval. To view this case, as did the dissenting judge below, as a method of policing the legal profession is to misconceive the thrust of the prosecution.

ARGUMENT

PETITIONER WAS PROPERLY ADJUDICATED GUILTY OF CONTEMPT FOR COMMUNICATING WITH MEMBERS OF A SITTING GRAND JURY, WITHOUT FIRST NOTIFYING THE COURT OR RECEIVING ITS PERMISSION

The central fact on which the finding of contempt rests is that petitioner, a lawyer, approached members of a still active grand jury as to matters which could have a bearing on their action as grand jurors without disclosure to or consent of the court. Both the District Court and the Court of Appeals held simply that petitioner, by sending without permission a written interrogatory to canvass the government employee members of the active grand jury which had indicted his client as to their personal bias toward reputed communists, had misbehaved in an official transaction in violation of 18 U. S. C. 401 (2).

Neither court below allowed itself to be drawn into a consideration of the larger issue which petitioner sought to inject into the case—whether a grand jury can be challenged for bias, and if so, under what circumstances. Since the thrust of this prosecution is directed toward the protection of the grand jury as an arm of the court in its traditional and constitutionally protected functions, there is no need to consider at this time, as did the dissenting judge below (R. 40), the use of the contempt power of the federal courts to police the legal profession. The sole issue here, as recognized in the opinion of the

Court of Appeals, is narrowly limited to whether or not the conduct of petitioner in the circumstances of this case constitutes contempt.

A. PETITIONER'S CONDUCT HAD A TENDENCY TO INTERFERE WITH AND HARASS THE GRAND JURY AND CONSTITUTED "MISBEHAVIOR"

The misbehavior for which petitioner was cited and found guilty of contempt consists solely in his unauthorized transmittal of a written questionnaire to some members of a duly empanelled and still active grand jury. The gravity of his act must be measured by examining its impact upon the proper functioning of the grand jury as safeguarded by the Fifth Amendment, which makes that institution a vital part of the federal judicial structure. See *Cobbledick* v. *United States*, 309 U. S. 323, 327; *Blair* v. *United States*, 250 U. S. 273, 282; *Ex parte Bain*, 121 U. S. 1. Because the grand jury is an arm of the court, it is entirely appropriate that the court should protect its integrity and vindicate its rights by use of the contempt power given in 18 U. S. C. 401.

The charge of misbehavior is grounded on petitioner's interference with and harassment of the grand jurors in their overall functioning. It does not rest upon an attempt to influence the grand jurors in relation to a particular case. This Court held in *Sinclair* v. *United States*, 279 U. S. 749, 762, that it was not essential to contempt

arising out of misbehavior in relation to a juror to show that the juror was in fact influenced. It was pointed out that such a requirement would "destroy the power of courts adequately to protect themselves—to enforce their right of self-preservation".[1] It is the free functioning of the grand jury as such, without being subjected to any undue harassment, that this prosecution was intended to protect.

The grand jury is an essential instrumentality of the federal trial court in criminal cases.[2] From its early beginnings to modern practice it provides a means whereby the representative opinion of the community is brought into and

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[1] An attempt to influence the jury with respect to a particular case would be a felony under 18 U. S. C. 1503. Whether, in that event, an individual would also be subject to contempt proceeding (cf. *In re Michael*, 326 U. S. 224) is not an issue here, since there is no such charge.

[2] In *Clawson* v. *United States*, 114 U. S. 477, at 487-488, Mr. Justice Blatchford quoted from the opinion of Chief Justice Marshall in *United States* v. *Hill*, 26 Fed. Cas. No. 15,364, at p. 317 (C. C. D. Va.), in which he said: "It has been justly observed, that no act of Congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indispensable implication. But how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential".

made part of each serious criminal case. It not only serves to protect the citizens from oppressive prosecutions by the government but also affords a means whereby individuals can air their charges and secure an investigation of wrongdoing. While grand juries of ancient times were selected because of the knowledge of their members of the situation into which they were to inquire, the modern grand jury rarely knows the facts until evidence is produced. Its members are now counselled by the court to act without malice or hatred and free from fear, favor, affection, reward or hope of reward.

Professor Wigmore, in his treatise on *Evidence*, after describing briefly in Section 2360 (Vol. 8, 3rd Ed.) the basic reasons for preserving the mantle of secrecy which protects the grand jury, set forth the privileges of grand jurors in Section 2361, as follows:

> The necessity for securing to the grand jurors an absolute freedom of deliberation and decision, immune from apprehensions of injury from the persons charged by them, demands a guarantee that by no legal process will the disclosure of their votes and their expressions of opinion in the jury room be compelled.

This "absolute freedom of deliberation and decision" deemed so important to the proper functioning of a grand jury would be severely impaired if grand jurors were to be subjected as a

matter of course, and without supervision, to inquiry as to personal bias by counsel for each person they indicted. To compel grand jurors to submit to such inquisitions would add greatly to the onus of their task and make many apprehensive of undertaking this important civic duty. Cf. *United States v. Morgan*, 313 U. S. 409, 421–422, where this Court held that administrators should not be subject to probing as to the mental processes by which they reached their decisions. See also *United States* v. *Smyth*, 104 F. Supp. 283, 301 (N. D. Calif.), where the court said:

> An inquisition into the private lives and concerns of grand jurors and their private conduct is an ill method in which to repay an arduous public service. These men and women have been dragged from their ordinary concerns and required by compulsory process to spend months at the public business which did not concern them except as it concerned all other citizens. Such service should not be rewarded by abuse.

As stated at the outset, both courts below found it unnecessary to decide, and we find it unnecessary to treat here, the question of whether a grand juror can ever properly be challenged for bias or whether, if such challenge can be made, it would justify the type of questions which were asked here. This case can properly be decided, as it was below, on the simple basis that, considering the well-established rules against unauthorized

contacts with jurors, an attorney can properly be held to knowledge that he should obtain permission from the court before questioning members of an active grand jury as to their state of mind with respect to issues which bear on the matters before them. In this way, assuming *arguendo* that inquiry would under some circumstances be justified, a court can protect the grand jury from needless harassment, can make certain that inquiry is allowed only in a proper case, and assure that the inquiry is not, as this one most certainly was, unduly sweeping. Such a rule imposes hardship neither on attorneys nor defendants and yet protects the grand jury from oppressive and unnecessary probing into their lives and thoughts.

There is nothing unreasonable in holding an attorney to knowledge that grand jurors, particularly members of an active grand jury, should not be approached without permission. The importance of the freedom of jurors generally from unauthorized contacts has been stressed by this Court and others in numerous cases.

Although *Remmer* v. *United States*, 347 U. S. 227, was concerned with the propriety of an alleged F. B. I. investigation of a petit juror, the statement of this court is equally applicable to situations involving grand jurors. The Court, at page 229 of the opinion, stated:

> The sending of an F. B. I. agent in the midst of a trial to investigate a juror

> as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions.

In *Sinclair* v. *United States*, 279 U. S. 749, the defendants employed a detective agency to shadow the members of the petit jury and to report daily on their surveillance. In upholding a conviction for contempt, this Court said, 279 U. S. at 765:

> If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility.

The observations of the court in *Rakes* v. *United States*, 169 F. 2d 739, 745–746 (C. A. 4), certiorari denied, 335 U. S. 826, although directed to the interrogation of petit jurors after the verdict, are also applicable to the questioning of grand jurors after an indictment is returned. The court said:

> The same rule requires that jurors are not to be harassed in any manner because of a

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[1] *Nye* v. *United States*, 313 U. S. 33, holding that the word "near" in the contempt statute imports a geographic proximity, casts doubt on the validity of the actual holding in the *Sinclair* case, but it does not lessen the force of the Court's statement with respect to the privacy of jurors.

> verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but *a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned.* It is incumbent upon the courts to protect jurors from it. [Emphasis added.][4]

Considering that a sitting grand jury is known to be protected by a "mantle of secrecy" as great as that surrounding a petit jury, petitioner, as attorney of record in this case, can justly be held to the minimum knowledge that he should not have approached active jurors without permission.

Petitioner seeks to justify his behavior in attempting to interrogate the grand jurors through the questionnaire by showing that defense counsel

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[4] To the argument that the government, by investigating jurors on other occasions in the past, had condoned the practice, this Court, in *Sinclair v. United States*, 279 U. S. 749, 765–766, tersely remarked that "violations of law by a give no license for wrongful conduct by others".

in *United States* v. *Weinberg*, Criminal No. 829-52 (D. D. C.), had canvassed a grand jury as to personal bias by use of a questionnaire without reprimand from the court, and also by relying on a statement in the government's brief in the Court of Appeals for the District of Columbia Circuit in *Emspak* v. *United States*, 203 F. 2d 54. Neither of these occurrences authorized petitioner to mail his letters.

Since the *Weinberg* case ended in acquittal, the presiding judge did not write an opinion or express himself formally on the propriety of mailing questionnaires to grand jurors. The court, after hearing arguments on defense counsel's pretrial motion for leave to examine the grand jury in open court on the question of bias, had denied the motion and observed:

> There is nothing to prevent counsel, if he sees fit, contacting those 15 members and inquiring only of *one subject*, whether or not they had any personal bias toward this man, Joseph W. Weinberg; and on that account, did they return the indictment. [Emphasis added.]

In the first place, this remark apparently constituted permission to make a limited inquiry; and for that reason the *Weinberg* case differs from this one. However, the remark can hardly be construed as authorizing the extensive and sweeping questionnaire covering many subjects (and significantly failing to ask the one question the

court authorized) which Weinberg's counsel sent to the grand jurors. The failure of the court to reprimand this transgression of its authorization to make inquiry on the single subject of "personal bias toward * * * Weinberg", cannot be deemed justification for petitioner's patterning of his questionnaire after that sent to the Weinberg grand jury.

Nor can a passing sentence in the government's brief in the Court of Appeals in *Emspak* v. *United States, supra,* be taken as authority for interrogating grand jurors without receiving prior permission from the court. The brief, directed to defendant's motion to examine the grand jurors in court, said in opposition:

> * * * yet, there is not the slightest indication in the long motion and offer of proof that an attempt has been made to interview a single one of the persons.

No suggestion was made that this should have been done without prior authorization. In addition, nothing in the opinion of the court indicated that this expression entered into its decision or was even considered.

Moreover, under the facts of this case, petitioner could not have been unaware that the questions he was asking did bear upon the issues which the grand jury was then considering. As noted in the Statement (*supra*, pp. 3–4, 6), on the very day that the letters were sent to the grand jurors, petitioner was before the district judge with relation to subpoenas served on associates of his

client, Ben Gold, and must have known that the continuing investigation related to matters such as communist affiliations, upon which his questionnaire bore. As an attorney, petitioner certainly should have been aware that this extraordinary questionnaire to the grand jurors (very different from the simple question of whether they were prejudiced against his client; the one question apparently authorized by the judge in the *Weinberg* case) bore too clearly upon the activities of the then functioning grand jury for him to be able to assume that such an approach to the grand jurors was justified without even informing the court of the fact that the questionnaire was being sent. At the very least, petitioner could properly be held to the duty of having to notify the court before attempting to contact the grand jurors.

The argument that the contact had to be made immediately because of the limitations of time upon a challenge to the grand jury (Pet. Br. 15) ignores the basic fact that petitioner should have known better than to contact a jury without permission. As the District Court noted (R. 25–26), had there been a suggestion of the need to investigate bias, and a showing of good faith in such investigation, the trial court "unquestionably would have postponed the time for filing motions until all indictments were filed and opportunity to ascertain the status of jurors had been afforded". The alleged necessity for prompt action does not excuse the failure to seek permission

from the court before approaching the grand jury, which was not only technically in session (as was apparently the situation in the *Weinberg* case) but which was actually deliberating on the type of case to which the questionnaire related.

There was nothing in the so-called "precedents" upon which petitioner allegedly relied to justify his assumption that he had the right to send the questionnaire at all. The grave questions as to the propriety of the questionnaire, however, need not be resolved in this case. Certainly, there was nothing in these alleged precedents to justify the sending of such a questionnaire to members of a grand jury, still actively considering the type of case to which the questionnaire related, without notification to and permission from the court of which the grand jury is the arm. Petitioner's conduct in so doing was clearly misbehavior by an attorney, who, as a lawyer, can properly be held to knowledge that such conduct was improper.

B. PETITIONER CANNOT AVOID LIABILITY ON THE GROUND THAT HE DID NOT INTEND "CONSCIOUS WRONG", SINCE HIS ACTIONS WERE KNOWING AND WILLFUL

Petitioner contends (Pet. Br. 17–20) that his conduct, even if "misbehavior", did not amount to contempt in that the element of intent is missing. He relies upon the following statement of the District Court (R. 26):

> While the Court finds there is no question as to the impropriety of what re-

> spondent has done, it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in *conscious wrong*. There seems to be reason to believe respondent may have misconceived the proprieties. What he did was open. There was no opprobrious personal approach to jurors. There is indication respondent may have believed he had a right to propound the questions at the time he did, notwithstanding this Court is of opinion he had not. Under these circumstances, in the absence of a positive declaration by the Court, it may be unjust to severely punish respondent as otherwise would be required. Granting respondent all favorable inferences, his acts clearly disregarded the protection which must be vouchsafed jurors. The Court finds him guilty of contempt and imposes a fine of $100. [Emphasis added.]

It is evident throughout this statement that the District Court was of the opinion that petitioner knew what he was about when he canvassed the grand jurors. To say that he may not have intended "conscious wrong" is merely to say that he may not have entertained an evil motive or acted maliciously to harass the grand jurors. This may be a factor in mitigation but it does not establish lack of criminal intent.

While it is undoubtedly true that criminal intent is a material and essential element of the crime of criminal contempt and must be proved

beyond a reasonable doubt (*Ex parte Hudgings*, 249 U. S. 378; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418), it is equally well settled that the government need prove only that the contemnor acted knowingly and willfully. There is no need to prove, as in prosecutions for crimes involving a specific intent, that the contemnor acted with bad purpose or maliciously.

In the several cases that have discussed the element of intent in contempt cases the courts have rejected any need for showing an "evil intent", as distinguished from a "criminal intent". When the question arose in *Kelly* v. *United States*, 250 Fed. 947, 950 (C. A. 9), certiorari denied *sub nom. Galen* v. *United States*, 248 U. S. 585, in which Kelly, an attorney, had been charged with contempt for knowingly visiting and conversing with certain members of the petit jury with a view to influencing them, the court stated:

> The principal question in the case is whether the conduct of the plaintiffs in error, so shown by the evidence and found by the court, was such as to constitute contempt of court. *In order that one may be held for contempt for communications with jurors, on the ground of the harmful tendency thereof, it is not necessary to prove that the communications had or the acts done were accompanied with a wrongful intent.* It is sufficient if such acts and communications were knowingly and willfully done * * *, and had the tendency to influ-

> ence improperly the action of the jury. [Emphasis added.][4]

The refusal of the courts to require proof of a special criminal intent in contempt-of-court cases is buttressed by the decisions of the courts in contempt-of-Congress cases which have held that the statutory requirement that the contumacious act be done willfully means only that it was done knowingly and intentionally. In *Townsend* v. *United States*, 95 F. 2d 352, 358 (C. A. D. C.), certiorari denied, 303 U. S. 664, the court stated:

> It is only in very few criminal cases that "willful" means "done with a bad purpose." Generally, it means "no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." *American Surety Co.* v. *Sullivan*, 2 Cir., 7 F. 2d 605, 606. In *United States* v. *Edwards*, 43 F. 67 * * * the court said: "'Willfully' means with design, with some degree of deliberation." In *Grand Trunk Ry. Co.* v. *United States*,

[4] See also Chief Justice Taney's statement in *Wartman* v. *Wartman*, 29 Fed Cases No. 17,210, at p. 306 (C. C. D. Md.): "As regards the question, whether a contempt has or has not been committed, it does not depend on the intention of the party, but upon the act he has done. It is a conclusion of law from the act." Cf. *Ellis* v. *United States*, 206 U. S. 246, 257, in which Mr. Justice Holmes stated: "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

> 7 Cir., 229 F. 116, 119, the court said: "The word 'willfully,' as used in the act, has a number of times engaged the attention of the courts, and has quite uniformly been held not to require an evil intent, but only that the defendant should have purposely or intentionally failed to obey the statute, having knowledge of the facts."

The same view of "willful" in contempt cases was followed in *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843, and *Fields* v. *United States*, 164 F. 2d 97 (C. A. D. C.), certiorari denied, 332 U. S. 851.

Petitioner insists that the District Court could not properly adjudge him guilty of contempt as long as it doubted "whether respondent's acts were committed in conscious wrong" (R. 26). This argument reads the words "in conscious wrong" out of context and divorced from their intended meaning. It rests upon a misconception of the intent required to be proved in criminal contempt cases. The true import of the court's words, gathered from the context, shows that it was considering evil motive, or its lack, in relation to penalty and not in connection with guilt.

Since petitioner knowingly and intentionally mailed the letters and questionnaires to the grand jurors, his insistence that he acted in good faith, believing that it was lawful and proper to canvass the grand jurors, cannot exonerate him. Whatever reasons induced him to believe he could, with

impunity, communicate with the grand jurors are immaterial, as it is well established that a mistake in law cannot excuse wrongdoing.[6] To the extent, however, that his *bona fides* precludes the existence of an evil intent or a purpose to flout authority, it may be considered a mitigating factor in assessing the punishment. The trial court, doubting that petitioner had acted "in conscious wrong", and concluding that it would "be unjust to severely punish respondent as otherwise would be required", imposed only a fine of one hundred dollars (R: 26).

C. SINCE PETITIONER WAS ACTING ON BEHALF OF AN INDICTED CLIENT FOR WHOM HE WAS COUNSEL OF RECORD, HIS "MISBEHAVIOR" WAS THAT OF AN "OFFICER OF THE COURT" ENGAGED IN AN "OFFICIAL TRANSACTION" WITHIN THE MEANING OF 18 U. S. C. 401 (2).

Neither the Court of Appeals nor the District Court encountered any difficulty in ruling that petitioner was an "officer of the court" within 18 U. S. C. 401 (2). Petitioner, in his answer to the show cause order, stated that he is a member of the bar of the State of New York, having been admitted to practice in that State in April 1933. He also recited that he had been retained as attorney for Ben Gold in connection with Gold's indictment in the District of Columbia and had, on August 31, 1953, filed an appearance *pro hac*

[6] The same argument, when advanced by a lawyer who had advised his clients that they could properly communicate with grand jurors, was completely rejected by the Sixth Circuit in *Schmidt* v. *United States*, 115 F. 2d 394, 396.

vice as attorney for Gold in the District Court for the District of Columbia (R. 8). Thus petitioner was an attorney of the District Court for the District of Columbia in his dealings with the grand jury empanelled by that court.

The guiding rule of the legal profession, that attorneys are officers of the courts before which they are permitted to practice, was clearly articulated in *Ex parte Garland*, 4 Wall. 333, 378, by Mr. Justice Field, who wrote:

> [Attorneys] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. * * * The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.[7]

This rule has been followed by all courts which have had occasion to consider the status of attorneys in relation to the courts. *Brooks* v. *Laws*,

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[7] See also, *Ex parte Robinson*, 19 Wall. 505, 512; *Ex parte Bradley*, 7 Wall. 364, 374; and *Tanner* v. *United States*, 62 F. 2d 601 (C. A. 10), certiorari denied, 289 U. S. 746, all of which involved contempt situations.

208 F. 2d 18 (C. A. D. C.); *Spilker v. Hankin*, 188 F. 2d 35 (C. A. D. C.); *Booth v. Fletcher*, 101 F. 2d 676 (C. A. D. C.), certiorari denied, 307 U. S. 628; *Bowles v. United States*, 50 F. 2d 848 (C. A. 4), certiorari denied, 284 U. S. 648; *Bartos v. U. S. District Court for the District of Nebraska*, 19 F. 2d 722 (C. A. 8); *Hertz v. United States*, 18 F. 2d 52 (C. A. 8); *In re Alexander*, 193 Fed. 749 (N. D. Ohio); *In re Wall*, 13 Fed. 814 (C. C. S. D. Fla.), affirmed, 107 U. S. 265.

That petitioner, as an officer of the court, was engaged in an official transaction within the meaning of 18 U. S. C. 401 (2) when he submitted the questionnaires and covering letters to the grand jurors seems apparent from the facts. The letters and questionnaires reveal on their face that petitioner, in causing them to be mailed in New York City and delivered in the District of Columbia, was acting in an official transaction, and using his official position as an attorney of the court in an attempt to obtain answers from the grand jury. The letters, prepared on petitioner's letterhead, stated that they refer to "U. S. v. Gold, U. S. District Court for the District of Columbia, Criminal No. 1344-53" (R. 3), a case within the jurisdiction of the court which exercised supervision over the addressees as grand jurors. The opening sentence, that the author of the letter is "counsel for the defendant, Mr. Ben Gold, in the above-entitled proceeding"

(R. 3), imports that the author was writing in his professional capacity as attorney in connection with the specific case. The official nature of this correspondence is highlighted by the petitioner's statement that he was writing the addressee "and all of the other Federal government employees who sat on the Grand Jury which indicted Mr. Gold" (R. 3). These letters, addressed to persons who were formally sworn and were officially members of a grand jury, concerning a person accused of a crime by an indictment returned by the addressee grand jurors, and prepared by an attorney who purported to act for the accused, bear all the indicia of correspondence in an official transaction.

Also bearing on the issue of whether petitioner acted in an official transaction when he caused these letters to be mailed is his statement to each addressee that it was his "duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case" (R. 4). By undertaking to instruct the grand jurors as to their duty in respect to the court, petitioner appears to clothe himself with more than private authority. He inferred, not too obliquely, that he was acting in the interests of the court as well as his client.

Because the grand jury is an official arm of the court, petitioner, by communicating with its members relative to a case within their official cognizance, and within the jurisdiction of the

court, was engaged in an official transaction. Mr. Justice Harlan, writing the opinion in *Savin, Petitioner*, 131 U. S. 267, 277, cited with approval the holding in *Heard* v. *Pierce*, 8 Cush. (Mass.) 338, 341, that "the grand jury, like the petit jury, is an appendage of the court".* Following the *Savin* decision, Mr. Justice Cardozo recognized the official status of grand jurors in the judicial structure, stating in *Clark* v. *United States*, 289 U. S. 1, 11, 12, that "[a] talesman, when accepted as a juror becomes a part or member of the court" and that, "[a] talesman, sworn as a juror, becomes, like an attorney, an officer of the court."

Thus, in the instant case, the letters and questionnaires were not only prepared by petitioner as an officer of the court but were directed to other officers of the same court. They concerned a case within the jurisdiction of the court and were to be used to attack the indictment returned by the grand juror addressees against petitioner's client. Such letters, prepared and mailed by an officer of the court, directed to other officers of the court, concerning a case officially before the court, were part of petitioner's official transactions involving the court. The fact that the official transaction may also have consti-

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*Cited with approval in *United States* v. *Dachis*, 36 F. 2d 601, 602 (S. D. N. Y.); *Camarota* v. *United States*, 111 F. 2d 243, 246 (C. A. 3). See also *United States* v. *Smyth*, 104 F. Supp. 283, 291 (N. D. Cal.).

tuted professional misconduct does not make it any the less a contempt of court under 18 U. S. C. 401 (2).

Though the phrase "in their official transactions", as used in Section 401 (2), first appeared in the federal contempt statute in 1831,[9] no case has been discovered which defines it in a situation similar to the one here involved. That the phrase does encompass the act of petitioner as an attorney in contacting members of the active grand jury which indicted his client in relation to the indictment of his client is evident from the language of the courts which have passed on other types of misconduct by attorneys under this statute. In *In re Paschal*, 10 Wall. 483, this Court considered motions filed by the State of Texas in this Court for an order to compel George W. Paschal, an attorney and counsellor of this Court, who had represented the State in two cases before the Court, to pay to the clerk for the benefit of the State money allegedly received by him under a

[9] Section 1 of the Act of March 2, 1831, 4 Stat. 487, limited the power of the United States courts to inflict summary punishment to the same three types of offenses as now appear in 18 U. S. C. 401. There were no Congressional debates preceding the Act of March 2, 1831, which throw light on the meaning of its phrases, other than the remarks of Mr. Draper of Virginia, 7 Cong. Deb. 560, which reveal that this Act's purpose was to narrow the broad contempt powers conferred on United States courts by Section 17 of the Judiciary Act of 1789, 1 Stat. 73, 83, and to deny them the power to punish by contempt hostile and unfavorable criticism in the press.

decree in one of the cases before the Court. Mr. Justice Bradley, writing the opinion, stated, at page 491, that:

> The application made on the first of these cases (No. 4), for an order on the respondent to pay money into court is in the nature of a proceeding as for a contempt. The application is based upon the power which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. For such improper conduct the court may entertain summary proceedings by attachment against any of its officers, and may, in its discretion, punish them by fine or imprisonment, or discharge them from the functions of their offices, or require them to perform their professional or official duty under pain of discharge or imprisonment. The ground of the jurisdiction thus exercised is the alleged misconduct of the officer. If an attorney have collected money for his client, it is *prima facie* his duty, after deducting his own costs and disbursements, to pay it over to such client; and his refusal to do this, without some good excuse, is gross misconduct and dishonesty on his part, calculated to bring discredit on the court and on the administration of justice. It is this misconduct on which the court seizes as a ground of jurisdiction to

> compel him to pay the money, in conformity with his professional duty.

In a comprehensive review of the law of contempt and its administration under the federal statute, the court in *United States* v. *Anonymous*, 21 Fed. 761, 771 (C. C. W. D. Penn.) cited the *Paschal* decision as authority for its statement:

> Attorneys are officers of the court, and are, like parties, witnesses, jurors, and the officials, entitled to protection, and are subject especially to the power of the court to compel them to behave themselves with propriety in such matters as pertain to the business of the court in all its ramifications.

This is a prosecution under 18 U. S. C. 401 (2) punishing misbehavior of an officer of the court in an official transaction. For this reason, considerations as to what constituted contempt "so near the court" as to obstruct the administration of justice are inapposite. Subsection (2), governing only the court's "officers in their official transactions", forbids "misbehavior" regardless of its geographical location and regardless of whether it results in an obstruction of justice. It is a vindication of the court's essential right to insist that its officers in their official transactions behave with propriety at all times and in all places.

Thus, the ruling in *Nye* v. *United States* 313 U. S. 33, overruling *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, that conduct which did tend to obstruct the administration of jus-

tice, however reprehensible, was not contempt within subsection (1)[10] unless in the geographical presence of the court, has no bearing on this case where punishment was imposed under subsection (2) of 18 U. S. C. 401. Similarly, *In re Michael*, 326 U. S. 224, in which false and evasive testimony before a grand jury by a court appointed trustee was held not to constitute contempt is inapplicable to the instant case. While the witness in that case had been a trustee of the court, in his appearance before the grand jury he was not acting in his official capacity as a then officer of the court in a pending case, and the attempt to punish him for contempt was under subsection (1).

The two *Schmidt* decisions relied upon by petitioner (*Schmidt* v. *United States*, 115 F. 2d 394 (C. A. 6) and *Schmidt* v. *United States*, 124 F. 2d 177 (C. A. 6) (see Pet. Br. 22–23)) are also distinguishable. Schmidt, an attorney, had advised his clients who had been indicted that they could lawfully interrogate the grand jurors concerning the evidence upon which the indictments were found. The clients, following Schmidt's advice, contacted several of the grand jurors and obtained from them affidavits which Schmidt filed in the court in conjunction with motions to quash

[10] Subsection (1) of 18 U. S. C. 401 extends the federal contempt power to "[m]isbehavior of any person in [the court's] presence or so near thereto as to obstruct the administration of justice."

the indictments. The court, on petition of the government, ordered Schmidt to show cause why he should not be adjudged in contempt "for filing these affidavits contrary to and in violation of the oath of said grand jurors, without application to or permission from the court, at a time when the grand jurors were subject to recall and before they were finally discharged". The court, in ruling that procuring and filing the affidavits under the circumstances was contempt because it constituted an obstruction of justice, based its decision on the forerunner of subsection (1) of section 401.

On the first appeal, the Court of Appeals said that Schmidt's advice which caused the "clients or the jurors themselves to disregard or ignore the oath [of secrecy] was, per se, an unlawful interference with the proceedings of the court, and, however honestly given, was at least a technical contempt." However, it reversed the conviction on the sole ground that the matter should not have been tried before a judge who was confronted by Schmidt's affidavits of bias and prejudice. On the second appeal, taken by Schmidt following his second conviction for contempt, the court ruled that the act of filing the grand jurors' affidavits was not misbehavior "in the presence of the court or so near thereto as to obstruct the administration of justice". It went on to say that Schmidt could not be held in contempt for misbehavior as an officer of the court in an official

transaction since he had not been so charged in the order to show cause. The second decision thus holds no more than that an attorney cannot be held guilty of contempt under subsection (2) when he has been charged with violating subsection (1).

Moreover, there was not present in the *Schmidt* case the element present here of an attempt to give the approach to the jurors the dignity of an official transaction. As discussed above, one of the factors which makes the conduct here misbehavior "in an official transaction" is that petitioner himself made it such; that it was written in petitioner's capacity as "counsel for the defendant," *i. e.*, as an officer of the court, calling upon the jurors as a matter of "duty", to help "enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case" (R. 4).

This is one factor to which Judge Fahy failed to give sufficient weight in his dissent below. Judge Fahy assumed that petitioner was an officer of the court and was guilty of misbehavior within the meaning of 18 U. S. C. 401 (2). The only problem for him was whether the conduct of petitioner was "that of an officer of the court in an official transaction" (R. 39). He succinctly stated his view (R. 40) that—

> * * * when he [petitioner] communicated by mail with grand jurors to obtain information in preparing his client's case he

> was not engaging in an official transaction as an officer of the court. In other words, I do not think Congress intended by § 401 (2) to grant courts the power by summary proceedings to police such professional behavior of a member of the bar.

Neither the application of the government for an order to issue to petitioner to show cause why he should not be adjudged in contempt (R. 1–6), nor the order of the court directing petitioner to show cause (R. 6–7), nor the order and opinion of the court adjudging petitioner in contempt (R. 24–26), reveal an understanding that this prosecution under 18 U. S. C. 401 (2) was to constitute mere disciplinary action. When an attorney, as counsel and in his capacity as an officer of the court, approaches the grand jury arm of the court in terms which speak of the "duty" of the grand jury to "enlighten" the court, he is doing more than merely acting as an attorney in a private transaction. He is using his official position as an officer of the court to give his request the formality and authority that inhere in the judicial process. That is the kind of conduct by an attorney which is an official transaction affecting the court. Since such conduct constitutes misbehavior (see *supra*, pp. 16–26), it is misbehavior by an officer of the court in an official transaction within the terms of 18 U. S. C. 401 (2).

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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No. 110

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HAROLD I. GAMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted pursuant to the request of the Court made in the course of oral argument on January 24, 1956.

1. The United States Attorney for the District of Columbia has provided us with the following information:

"a. In the District of Columbia no investigation of any kind is made by the United States Attorney or by members of his staff, or at his or their request, regarding persons named to serve as grand jurors. This has always been the policy in this district as far as he or members of his staff have any knowledge.

"In the event that reports are received, after either a grand or petit jury has been impaneled,

which indicate the possibility of jury tampering, such a matter will immediately be called to the court's attention and, if necessary and advisable, referred to the F. B. I. for investigation. Cf. *Remmer* v. *United States*, 347 U. S. 227.

b. The grand jury selection process in the District of Columbia is administered by the jury commissioner. It has been his practice to take names at random from the city directory, the telephone book, and other comparable publications. He then mails questionnaires to all individuals selected. These questionnaires seek information as to the age, residence, and employment of the individual in question. They also seek information as to matters which might affect statutory qualifications as a juror, including possible convictions of any offense involving moral turpitude.

The jury commissioner reviews the answers to these questionnaires and determines from the answers whether the individual is apparently qualified for jury service. The names of such individuals are then placed in a large receptacle, from which drawings are made in the presence of witnesses by the jury commissioner or his representative. Those whose names are thus drawn are then sent to the judge whose duty it is to make the final selection of the grand jury panel, and the Clerk of the District Court forwards each jury list to the Police Department for

a check as to whether any juror has a police record.

The Clerk of the District Court maintains cards on each grand juror actually selected. These cards set forth the juror's name, address, age, and employment. These cards are equally available to defense counsel and to the United States Attorney and his staff. The jury commissioner treats as confidential the returned questionnaires, which are not available either to defense counsel or to the government.

c. For a number of years it has been the practice of the Assistant United States Attorney in charge of grand jury matters in the District of Columbia to discuss the duties and responsibilities of grand jurors with each grand jury which has just been sworn in. In basic fairness both to the members of the grand jury and to the individuals whose cases may be presented, he tells the jurymen as part of this discussion that if any case is presented to them in which any of them know the prospective defendant or anything about him, or if they know witnesses who may appear before them, they should bring that fact to the attention of the foreman. They are further told that if they feel that their personal knowledge, either of the individual or of the witnesses, might in any wise influence their judgment in the decision they are required to make, they should consider the advisability of voluntarily absenting themselves from consideration of the particular

case in which their own personal knowledge may play a part. From time to time individual jurors do indicate acquaintanceship either with a prospective defendant or with a witness and that for this reason they would prefer not to serve in considering a particular matter. Apparently in all such cases the juror is invariably excused from all further connection with the particular matter.

2. As regards the question whether any procedure exists for a prospective defendant to challenge the qualifications of a grand jury panel or of an individual grand juror prior to indictment, we refer this Court to Rule 6 (b) of the Federal Rules of Criminal Procedure. This rule provides.

> (b) *Objections to Grand Jury and to Grand Jurors.*
>
> (1) *Challenges.*—The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.
>
> (2) *Motion to Dismiss.*—A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An

> indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Rule 6 (b) (1) specifically permits either the government or "a defendant who has been held to answer in the district court" to challenge either the array or an individual juror. Cf. *United States* v. *Gale*, 109 U. S. 65, 69–70; *Clawson* v. *United States*, 114 U. S. 477; *Agnew* v. *United States*, 165 U. S. 36, 44.

No specific provision has apparently been made for a challenge by an individual who has not been "held to answer in the district court" (see Rule 5 (c), Federal Rules of Criminal Procedure), but is merely being investigated by the grand jury for possible indictment. Such an individual would, of course, be free to notify the district judge, before whom the grand jury was being or had been impaneled, as to any information bearing upon the qualifications of either the panel or an individual juror. This could be done informally, or by a suggestion *amicus curiae*, or by a formal motion. It would then be up to the court as a discretionary matter whether the information warranted an immediate investigation. Assuming that no such investigation was

deemed necessary and that an indictment was subsequently returned against the complainant, he would then have the right to file a motion to dismiss the indictment on the grounds set forth under Rule 6 (b) (2).

As was brought out in oral argument, the question whether and under what circumstances an indicted defendant is entitled to a hearing when he makes general charges of bias against grand jurors based solely upon the impact of the government's loyalty program on government employee jurors, has not been determined by this Court. The question was before this Court in *Quinn* v. *United States*, 349 U. S. 155, but was not reached. Divergent views upon this question have been expressed by the members of the Court of Appeals for the District of Columbia. See *Emspak* v. *United States*, 203 F. 2d 54, 56, 58–60, 60, 61, reversed on other grounds, 349 U. S. 190; *Quinn* v. *United States*, 203 F. 2d 20, 25, 26–32, reversed on other grounds, 349 U. S. 155.

Respectfully submitted.

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